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THE

AMERICAN JURIST,

AND

LAW MAGAZINE.

VOL. III.

JANUARY AND APRIL. 1830.

'Hanc igitur video sapientissimorum fuisse sententiam, legem neque hominum ingeniis excogitatam, nec scitum aliquod esse populorum, sed æternum quiddam, quod universum mundum regeret, imperandi prohibendique sapientia.'—CICERO.

BOSTON,

FREEMAN & BOLLES, COURT STREET, CORNER OF BRATTLE STREET.

1830.

CONTENTS

OF

No. VI.

ART. PAGE.

I. OBSTRUCTION OF A NAVIGABLE CHANNEL . 185

An Opinion of Judge Thacher.

II. BANKRUPT AND INSOLVENT LAWS . . 201

III. PROBATE LAWS 237

1. The Probate Laws of Massachusetts, digested and arranged; comprising the subjects of Wills, Devises, Legacies, Dower, Descents, and Distributions, &c. With an Appendix of Forms. By William Blair, Counsellor at Law.

2. The Probate Directory, or a Complete System of Forms for the use of Probate Courts; together with Directions for Proceedings in the various stages of administering and settling Estates, according to the existing laws of New Hampshire, and containing the substance of the Probate Laws of Massachusetts and Vermont, and adapted to the practice in those states. By a Counsellor at Law 237

IV. ATHENIAN MARITIME LOANS . . . 248

V. LIMITATION OF REAL ACTIONS IN TENNESSEE 255

VI. HABEAS CORPUS—SEAMAN IN THE NAVY . 281

VII. A READING ON DAMAGES IN ACTIONS EX DELICTO 287

VIII. RECENT REPORTS 314

1. Reports of Cases Argued and Determined in

the Court of Appeals of Maryland, in 1826 and 1827. By Thomas Harris and Richard W. Gill.

2. Connecticut Reports. Vol. VII. Part I. Or Vol. II. Part I. of New Series. Containing the Decisions of 1828. By Thomas Day.

DIGEST OF RECENT DECISIONS 352

LEGISLATION.

Maine 390

New Hampshire 393

Virginia 397

Alabama 399

INTELLIGENCE.

Rights of Slave Holders, in the states in which slavery is not permitted. Extracts from opinion of Judge Morris, of Indiana 404

Written Votes 408

Law Reforms in England 408

Notice of Lord Redesdale 412

Notice of Mr. Justice Burrough . . . 414

QUARTERLY LIST OF LAW PUBLICATIONS . . 415

CONTENTS

OF

No. V.

ART.		PAGE.
I.	INSANITY PRODUCED BY INTEMPERANCE . .	5
II.	TESTIMONY OF PERSONS INTERESTED IN A SUIT Whether persons interested in the event of a cause, ought not to be rendered competent witnesses on the trial thereof before a jury.	20
III.	SHIPS AND SHIPPING	26
IV.	SEAMEN'S WAGES	40
V.	CONSTRUCTION OF A POWER OF ATTORNEY, AND OF A DEED	52
	Opinion of David Hoffman, Esq. of Baltimore, on a case depending in Georgia.	
VI.	HOFFMAN'S LEGAL OUTLINES	86
	Legal Outlines, being the Substance of a Course of Lectures now delivering in the University of Maryland. By David Hoffman. Indocti discant, ament meminisse periti.	
VII.	PETERS'S REPORTS	101
	Reports of Cases Argued and Adjudged in the Supreme Court of the United States, January term, 1829. By Richard Peters.	
VIII.	NEW HAMPSHIRE CASES	109
	Cases Argued and Determined in the Superior Court of Judicature of the State of New Hampshire. Vol. I. Part I. Containing Cases from January to November, 1827.	
IX.	PROVINCIAL AND COLONIAL LAWS . .	115
	The Force of Provincial and Colonial Laws and Customs since the Establishment of Independence.	
	DIGEST OF RECENT DECISIONS	122
	LEGISLATION	
	Pennsylvania	142
	Illinois	145

Maryland 151
INTELLIGENCE AND MISCELLANY
Obituary Notice of the Hon. Bushrod Washington, late one of the Justices of the Supreme Court of the U. States 156
Trial of a Deaf and Dumb Person 158
Whether a Minor is to be joined as Defendant in a suit on a contract to which he is a party . . 163
Lord Tenterden 163
Judges in the United States 167
New Regulations of the Inner Temple . . 174
Law-Suit about a Surname 177
Legislative Decrees of Divorce 180
Summary process against tenants to compel a surrender of the demised premises at the expiration of the term 181
Tax on Law Suits 181
Law Drafting 182
QUARTERLY LIST OF LAW PUBLICATIONS . . 183

AMERICAN JURIST.

No. V.

JANUARY, 1830.

Art. I.—INSANITY PRODUCED BY INTEMPERANCE.

The subject of medical jurisprudence has not, until within a few years, received the attention to which it is entitled as a branch of legal study. Previous to Dr. Beck's 'Elements of Medical Jurisprudence,' there was no systematic work in our language, which could be recommended to the student at law as containing a clear and comprehensive view of what has been well defined 'the science which applies the principles and practice of the different branches of medicine to the elucidation of doubtful questions in courts of justice.' In most cases where knowledge of this kind is to be applied, great reliance is placed upon the opinions of medical men, whose information and experience best enable them to form a correct judgment. But as these opinions are to be drawn from them upon their examination as witnesses, it must be admitted that some acquaintance with this science is necessary to enable the court to estimate the extent of the witness's knowledge, to weigh the force of his evidence, and to judge of the correctness of his conclusions. It is indeed essential to the right administration of justice in criminal cases. In questions of homicide, for instance, a little experience in courts of justice will show how requisite it is for the jurist to have some acquaintance with the nature of diseases, the effects of violence upon the human system, and the vast variety of causes which produce death. What is an adequate cause of death? did it happen in the course of nature, or by accident? was it occasioned by violence or hastened by cruel treatment? are often material points of inquiry. In questions of insanity, which form a most im-

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the cabin, when Drew suddenly left the table and appeared to conceal something under his jacket which was on the transom in another part of the cabin. He immediately turned round to Mr. Clark and requested him to go upon deck; the reply of Clark was, 'When I have done my breakfast, sir.' Drew said 'Go upon deck, or I will help you,' and immediately took from the transom a knife which had been covered over by his jacket, and before another word was spoken by either, he stabbed Clark in the right side of his breast. Clark was rising from his chair at the time the knife struck him, and immediately fell upon the floor. He afterwards rose up and went upon deck alone. As the witness left the cabin, Drew cocked his pistol, pointed it at him, and snapped it, but it missed fire. Capt. Drew followed them upon deck, and addressing the chief mate, said 'Mr. Coffin, in twenty-four hours from this, the ship shall go ashore.' He was then seized, bound hand and foot, and a guard was stationed over him. His whole demeanor, for some time after, was that of an insane person. He would frequently call upon persons who were not on board, and who never had connexion with the ship. Some weeks after, when Drew first appeared to be in his right mind, he was informed of the death of Clark and its cause, he replied that he knew nothing about it, that when he awoke he found himself handcuffed, and that it all appeared to him like a dream. There had not been for months any quarrel or high words between Clark and Capt. Drew.

The second witness was Moses Coffin, the first mate of the ship. Coffin stated that Capt. Drew had been in the habit of drinking, and that it was by the order of Drew that the keg of spirits was thrown overboard. He recounted numerous instances in addition to those before stated, of frivolous complaints made by Drew, of his countermanding his orders, of his fear of being left alone, and his conversation with imaginary beings by whom he supposed himself surrounded, all going to prove physical weakness and alienation of mind. Though familiar with his habits, the witness had not, before this affair, supposed him insane. With regard to Clark, the witness dressed his wound and took care of him. Two physicians at a Spanish port, which they reached soon after, gave it as their opinion that it was not dangerous, and that it would be well in a few days; but Clark himself had said, in describing his complaint to witness, that the wound caused an internal flow of blood. It healed externally before Clark expired.

At this stage of the proceeding, the Court asked the District Attorney if he expected to change the posture of the case. He admitted that unless upon the facts stated, the court were of opinion that this insanity, brought on by the antecedent drunkenness, constituted no defence for the act, he could not expect success in the prosecution. After some consultation, the opinion of the court was delivered as follows:

Story, J. We are of opinion that the indictment upon these admitted facts cannot be maintained. The prisoner was unquestionably insane at the time of committing the offence. And the question made at the bar is, whether insanity whose remote cause is habitual drunkenness, is or is not an excuse in a court of law for a homicide committed by the party, while so insane, but not at the time intoxicated or under the influence of liquor. We are clearly of opinion that insanity is a competent excuse in such a case. In general, insanity is an excuse for the commission of any crime, because the party has not the possession of his reason, which includes responsibility. An exception is when the crime is committed by a party while in a fit of intoxication, the law not permitting a man to avail himself of the excuse of his own gross sin and misconduct to shelter himself from the legal consequences of such crime. But the crime must take place and be the immediate result of the fit of intoxication, and while it lasts, and not as in this case a remote consequence, superinduced by the antecedent exhaustion of the party, arising from gross and habitual drunkenness. However criminal, in a moral point of view, such an indulgence is, and however justly a party may be responsible for his acts arising from it to Almighty God, human tribunals are generally restricted from punishing them, since they are not the acts of a reasonable being. Had the crime been committed while Drew was in a fit of intoxication he would have been liable to be convicted of murder. As he was not then intoxicated, but merely insane from an abstinence from liquor, he cannot be pronounced guilty of the offence. The law looks to the immediate and not to the remote cause, to the actual state of the party, and not to the cause which remotely produced it. Many species of insanity arise remotely from what, in a moral view, is a criminal neglect or fault of the party, as from religious melancholy, undue exposure, extravagant pride, ambition, &c. &c., yet such insanity has always been deemed a sufficient excuse for any crime done under its influence.

The jury without retiring from their seats, returned a verdict of *not guilty*. The case was conducted for the government by *George Blake*, Esq. District Attorney; for the prisoner, by *Daniel Davis* and *Francis Bassett*, Esquires.

An account of a trial before the Supreme Court of the state of Ohio, has just come into our hands, which, though different in some of its features, bears a strong resemblance to the case of Drew. In this case the point of law did not come directly before the court for a final decision. Whether the accused was at the time he committed the homicide, capable of discriminating between right and wrong, was a question, from all the circumstances of the case to be left to the jury, and they having returned a verdict of *guilty*, the court upon a motion for a new trial did not think proper to interfere and disturb the verdict. The opinion of the court, however, so far as it can be gathered from incidental remarks made at the argument of counsel for a new trial, would seem to be at variance with the decision of the Circuit Court in the case of Drew. They say 'that they were not called upon to give an opinion, whether *Mania a potu* would, under any circumstances, be an excuse for the commission of a crime, but they feel no unwillingness to express their opinion, that if the insanity was the offspring of intemperance and the prisoner *knew* that intoxication would produce it, he could not plead it as an apology.' This intimation from the court, and the result of the trial, seem to have produced considerable excitement in that quarter of the country, and have drawn to the subject the attention of Dr. Drake, a distinguished medical professor, who, in the 'Western Journal of the Medical and Physical Sciences,' has stated the case and accompanied it with an elaborate discussion of the question 'whether *Mania a potu*, either temporary or protracted, be an excuse for crime.' He comes to the conclusion, the correctness of which we cannot doubt, 'that insanity of this kind ought in law to be an immunity from punishment.' His statement of the case is as follows:

'John Birdsell, of the village of Harrison, in the western part of this county, on the 3d inst. was arraigned before the Supreme Court of Ohio, for homicide. Present on the bench, Judges Pease and Sherman. In the indictment it was laid, that the defendant, on Thursday evening, 5th of March, 1829, murdered his wife, by cutting through her neck from side to side, with a narrow axe, at a single blow, which severed the spinal column,

and caused instant death. The proof of the fact was perfect and uncontroverted. The defence set up was *Mania a potu.* Having recorded the principal facts, and also been furnished with the notes of the prosecutor and one of the advocates, I propose to lay before the reader such portions of them as have a relation to the subject of *Medical Jurisprudence.*

'The defendant was to appearance about fifty years of age, and had been married nineteen or twenty years to a second wife, by whom he had several children, one of whom was a witness in the case. It appeared from the testimony, that for several years he had been subject to occasional fits of intoxication, which in the latter part of the time had been followed by *Mania a potu,* which generally lasted for several days, and went off spontaneously. In these paroxysms he had the physical and moral symptoms which usually characterize that malady. The former were, great tremors of the hands, a pale face, red eyes, and sometimes a copious perspiration even when exposed half-naked to a cold atmosphere. The moral phenomena were, disordered perceptions of sight and hearing, so that he often insisted, that he saw himself surrounded by snakes and other reptiles, or by armed men who sought to kill him; or supposed he heard strange sounds of trumpets, or vocal music, or conversation of which he was the subject, and the object of which was mischief to himself. He was thus filled with apprehension for his safety, and sometimes ran about the village at night, as if attempting to escape from bad persons who were pursuing him. On a certain night, he made so much clamor as to excite the idea of several men engaged in a riot. At another time, in his own house, he concealed himself between the feather and the straw bed, where he was almost suffocated. On another occasion, he was found, after dark, standing in the street without shoes or hat, and had described around him a circle in the dust, and declared, that if any one entered it, that person would kill him. At other times he would peep from his window, and point his gun, as for defence, against imaginary persons, who were approaching to seize him. Again, he would fancy that two armies were engaged in battle, and that he must join one of them. In all his paroxysms he had so great a degree of watchfulness, as to sleep little or none for several nights in succession. But his prevailing maniacal conception was, that his wife was in a combination with three of his neighbors, one of whom was his son by a former wife, and that they had conspired against his life. Of these men, when they were not in his presence, he was afraid. In the paroxysms he was accustomed to charge his wife (unfoundedly in the opinion of witnesses) with a criminal intimacy with these persons. He even threatened to kill her if she did not desist, and had been heard to utter this threat, when he was thought by one of the witnesses to be rational.

'On the Sunday before the murder, he drank freely, and was intoxicated, in which condition, as usual, he was quiet, dull, and disposed to lie in bed. Monday, Tuesday, and Wednesday presented nothing special. On Wednesday evening he complained to a neighbor of feeling unwell, and asked his son's assistance in the performance of some necessary manual labor for his family. He seemed to the witness to be rational. During the night he slept none, and complained of cramp in his stomach. The next morning his family thought him crazy, but were not alarmed, as they were accustomed to such attacks. In the course of the day, he took an axe on the shoulder, and walked rapidly to the house of a neighbor, whom he desired to go home with him, saying they wanted to kill him; and about the same time he told another of the supposed conspirators, that he had overheard his wife and him that morning whispering about taking his (the witness') life.

'He spent the day at home in the midst of his family, apparently in agitation and terror, but said he would not hurt any one, and did not wish to be hurt. In addition to the axe, which he placed under the bed, where it was often kept, he provided a scythe, which he brought into the house. He manifested jealousy of his wife, and told her to act better, for she had already caused the death of thirty thousand men. He fancied that the persons of whom he was jealous, were in the loft manufacturing ropes to hang him, and going up, returned and said he had cut the ropes to pieces, and brought down the fragments with him, though he had nothing in his hands. In the course of the afternoon, he fastened both the doors of his house. At the usual time his wife went out to milk, and he barred the door after her. On her return he fastened it again. She was seated near the fire, and he was walking the room. At length he took the axe from under the bed, and suddenly gave the fatal blow, following it up with two others on the face. His oldest daughter caught the instrument, which he yielded up, and then seized the scythe, with which he attempted to strike her. She defended herself with a chair, till the smaller children having opened the door, she made her escape. He took his youngest child in his arms, and sat down by the window. The child exclaimed, 'mamma bleeds!' which he said made him feel bad. When his neighbors arrived immediately afterwards, he gave himself up, acknowledged what he had done, said he knew he would be hung for it, but that he ought to have done it nine months sooner; and that if he had it to do again, he would strike two blows where he only struck one. Talked so rationally, that many of the witnesses could not believe him deranged. Evinced no dread of punishment for his crime, but was still in great apprehension from the persons who, he had believed, intended to kill him. Was glad that he had defeated their calculations. On his way to the city to be committed to

jail, talked rationally and composedly about his affairs, and on various subjects; but frequently asked the guard if they did not hear sweet sounds of different kinds, and on being answered in the negative, insisted that he could not be mistaken. After being committed he became regular, [rational?] and expressed his regret at what he had done.' *Western Journal*, pp. 44—47.

After some remarks upon the nature of delirium tremens and insanity, Dr. Drake says,

'It must be shown, either that the culprit is insane on all subjects, to such a degree as to pervert his affections and destroy his estimate of right and wrong; or that his crime had some natural connexion with the subject of his hallucination. *Submitting to these requirements*, the subjects of *Mania a potu* seem fairly entitled to plead their alienation, when arraigned for crimes. As I have already said, they have disordered conceptions, of intense and bewildering vividness, which, it is true, they sometimes regard as delusions, but oftener mistake for realities, and act accordingly. Their passions, particularly those of fear, jealousy, and anger have an uncontrollable mobility; their desires and aversions are equally morbid, and their will displays a wild and sleepless energy of action. In this condition, they may still distinguish between right and wrong, on many subjects, provided their attention can be fixed, and the subjects have no connexion with the trains of thought with which they are incessantly occupied; but in reference to these, they judge and act on the conviction of their reality; that is, with a firm belief, and should not, therefore, be held accountable." *Western Journal*, p. 53.

Again he says,

'I appeal to the enlightened members of the profession every where, whether here are not all requisites of a case of monomania:—Assumed and unreal premises,—deductions true to the principles of logic, but false in point of fact,—lastly, acts consistent with his conclusions. On other subjects he might have been regular enough, but on this he had gone astray; on others, he could judge between right and wrong; on this, his estimate of right and wrong took its character from his delusion. Had he killed, in a real dispute, some other person, not of the conspiracy, the act would have been foreign from his hallucination, and should not have been excused; but when he murdered one of the conspirators, he kept himself within the pale of that hallucination, and acted in accordance with his erroneous conceptions. Both the court and prosecutor admitted, that he labored under derangement; but because he manifested a perception of right and wrong on certain subjects, seemed disposed to argue, that he must have had a perception of right and wrong in reference to the subject

of his insanity! I would ask, whether if he had been equally insane on all other topics, they would have looked for manifestations of a correct estimate of right and wrong? I think they would not, and still, to be consistent, they should.

'It must not be forgotten, that it was admitted by all, that he was deranged. The difference of opinion related to its degree; the prosecutor and others, regarding it as insufficient to justify him, others as sufficient. But he did an act, felonious in its nature, directly connected with his erroneous opinions; and I would put to them the question, whether, if he performed a sane action, and for such only could he be held accountable, it would be one connected with his insanity? I think not. [The] *non compos* cannot be of sound mind on the subject of his derangement, though he may be on every other.

'I will here take occasion to say, that of the various forms of mental alienation, monomania, or partial insanity,* is not only the most dangerous to the peace of society, but by far most difficult to establish to the satisfaction of an ordinary jury. The broad and hideous features of *general* madness, or mania proper, cannot be mistaken by the most ignorant; but such madmen are generally harmless. They may give an unlucky blow, but they have no design, no plan, no perseverance, no concealment. Not so with the monomaniac. On some subject, or group of subjects, his conceptions are wrong, and his assumptions false. The error lies in his premises, more than his conclusions; you may reason him into a modification of the latter, by correcting his logic; but no argument, persuasion, or authority, can drive him from the former. The spirit of his delusion cannot be exorcised. It governs him with despotic power, but its jurisdiction is limited. He has, as it were, two cotemporary states of intellectual being, with alternate manifestations; one in common with those around him; the other peculiar to himself. In the former, he feels, and thinks, and acts, in consonance and sympathy with his race; in the latter, he contemplates nothing but the objects embraced in his delusion; and regardless of consequences, looks only to their accomplishment. In this morbid state, we may often see much of his original character. If mild, timid, and benevolent, his insanity is less to be dreaded—if suspicious, he becomes jealous—if proud, haughty and impetuous—if ill-natured, ferocious and revengeful. Hence, men of bad passions are most likely, when insane, to commit outrages, and are least likely to receive the commiseration of society, or the courts of justice, which seems to have been

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'* It may not be amiss for us to recollect, that a *partial* insanity is not an alienation slight in degree, but limited in the extent of its objects. Under this view a derangement may be on a single point only, and still have a character of most terrific energy.'

the character and fate of the convict Birdsell. But whatever may have been the natural disposition of the monomaniac, or the nature of his delusion, it can never be pronounced absolutely safe, to allow him unrestrained liberty. His hallucination may continue the same, but the actions which it originates, may vary from day to day. He may alter his plan of operations, while his objects remain unchanged. Passions the most opposite may possess him in successive hours. The flame which lights them up is not from without, but lies smouldering in the recesses of his own bosom. Hence his conduct cannot be foretold. He sets prediction at defiance, and at the moment when the watchmen around him cry "all's well," he may be meditating outrages of the bloodiest die.' *Western Journal*, pp. 57—59.

He farther observes,—

'If this variety of mental alienation cannot constitute a valid defence, it can only be from the character of its remote cause. But I would ask, whether the court and jury have a right to travel behind the testimony which establishes the insanity, to inquire into its causes, and estimate the culpability of [the] *non compos*, not by the degree of his alienation, but the criminality of those causes? I think they have no such right. But if it is correct for them to do it in one case, it is equally so in all others; and whenever insanity is offered in defence, its causes should be ascertained and made to determine the guilt of the accused. This, I apprehend, would be a new principle in jurisprudence. Let us look at the practice to which it would lead. *Mania a potu* is, sometimes, the consequence of the use of opium; and frequently results from daily stimulation with ardent spirits, without their being ever taken to the extent of intoxication. Now all the acts of a *non compos* from either of these causes must be pardoned, because there is nothing criminal in such use of stimulants. Moreover, drunkenness itself is not unlawful, and cannot, therefore, impart a character of criminality to the actions of him in whom it may excite insanity. There are, however, many other causes of this malady which *are* criminal, such as gambling, duelling, and prostitution, all of which should be inquired into, and when found real, must, if the principle is adhered to, be made to impart criminality to the actions of [the] *non compos;* while he would be exempt from punishment, if his derangement arose from causes not immoral. But this, I venture to assert, was never done in any country. The truth is, that the immunity from punishment, results from the insanity itself, and not from the nature of the causes which produced it. Further, although *Mania a potu* is essentially a temporary disease, it often happens, where there is a predisposition, that insanity is permanently established by intemperance. Now, in such a case, referring to its exciting cause,

the individual should be held responsible, throughout the whole of his after life; but the law expressly exempts him from all punishment, save the confinement which his own personal safety, not less than that of society, imperiously requires.' pp. 61, 62.

We subjoin the following views of a writer in the 'Boston Medical and Surgical Journal,' relating to the same case.

'The law which holds the madman exempt from the punishment of crimes committed under the influence of his derangement, is obviously founded in reason and humanity. This immunity, however, does not, according to the common law, extend to the drunken man who commits a crime while under the excitement of liquor. There are several reasons for the severity of the law on this point, some of which respect the criminality of the evil doer, and others have a principal reference to the security of the public. We will endeavor to present these to our readers in a distinct form:

'1. Drunkenness is itself a crime, and he who alleges it as an excuse, attempts to take advantage of his own wrong. "The law," says Blackstone, "will not suffer any man to privilege one crime by another." The language of Lord Coke on this point is still stronger. "The drunkard," says he, "is voluntarius dæmon, and whatever ill he doth, his drunkenness shall aggravate it. Nam omne crimen ebrietas et incendit et detegit."

'2. The drunkard deprives himself of reason, knowing that when so deprived, he is liable to commit violence on the persons of others. The first crime, therefore, includes the consequences which result from it. Such is the language of the Roman law: "Culpâ non carent, quod inebriari se passi sint." And again: "Quid quod nec dolo careant,"—they cannot even be acquitted of evil intention; "si non simpliciter ebrii, id est tales qui præter consuetudinem vino capti sunt, dum suas aut vini vires ignorabant, aut inviti compellebantur cum strenuis paria bibendo facere; sed vel ebriosi qui ignari non sunt quo ruere soleant vino victi, vel etiam insolentes qui hanc ob causam largius bibunt, ut audentius in injuriam eant." (*Voet in Pandectas*, xlviii. 10. 1.)

'3. If the law were otherwise, drunkenness might be pretended, in order to commit crime with impunity, and a fraud of this nature could not, without great difficulty, be detected.

'4. The same state might voluntarily be incurred, for the double purpose of exciting the courage to commit a crime, and of escaping its penalties; and thus the hardened villain would be furnished with direct means to elude justice. Such is the character of the wretches described by the author above quoted; "insolentes qui hanc ob causam largius bibunt, ut audacius in injuriam eant."

'Two general propositions, then, are involved in the law on this subject: 1. That in using liquor to excess, knowing its

possible consequences, the drunkard makes himself answerable for these consequences. 2. That the public welfare requires that he should be held thus answerable. We have then to consider the correctness of these principles in themselves, and their application to the case of delirium tremens.

'1. If it be true, then, that he who indulges in liquor makes himself responsible for all its effects, the maniac *a potu* can no more claim immunity, than he who acts under the immediate influence of intoxication. We cannot escape this conclusion by saying, that the delirium in question is a remote and distinct effect of the indulgence; that it occurs as the sequel of long-continued and repeated excess; or that it often, nay generally, happens in consequence of withdrawing the very stimulus to which the drunkard is accustomed. It is still among the effects of this vice; an evil which subsists in virtue of intemperance, and which would not subsist without it. If, then, in the phrensy of his delirium, the unfortunate subject of it commits murder, this too was among those possible consequences of his original excess, for which he made himself responsible. But is it not obvious that this mode of reasoning proves too much? Suppose the drunkard to have passed through the successive paroxysms of ebriety, and even the short-lived mania of delirium tremens, without committing any serious act of violence on the persons of his fellowmen. A darker doom now awaits him. The repeated shocks which his reason has received have finally overpowered it. He becomes permanently insane, and while in this state, commits an outrage on the person, or takes the life, of some one unhappily exposed to his fury. Would it be said that the action was not excused by his insanity, because he brought that insanity on himself? Such an argument never could be listened to with patience, either within a court of justice or without it. By the late reports of madhouses in England, it will be seen, that a very considerable proportion of their inmates have become so from this indulgence. All these, then, are moral agents, and responsible for the crimes they perpetrate. Nor is this all. The victim of gaming, of debauchery, of unnatural crime, are equally in this sense the authors of their own misfortunes; and shall we add to this the imputation of guilt, when their phrensy has inspired them to the commission of acts, in their nature violent and unlawful? We freely confess that such a sentiment seems to us to violate the plainest dictates of humanity, and we are not aware that it is sanctioned by the laws of any civilized nation.

'2. Are the considerations of expediency, on which the drunken man is made responsible, equally applicable to the subject of *Mania a potu*? The reasons for the law, arising out of these considerations, are, as abovementioned, the ease with which drunkenness may be simulated, and the possibility of its being

induced for the sake of committing crime. Neither of these reasons has any application to the case of delirium tremens. With regard to the first, we venture to assert, that there is no form of mania, the counterfeiting of which is attended with more serious difficulty than the one in question. It is a disease induced by peculiar causes, and accompanied and marked by appropriate symptoms, some of which it is utterly impossible to simulate. It is a disease which comes on slowly, with gradually increasing violence, until it arrives at its acme, which often does not happen for many days. The task of one who should attempt to counterfeit its gradual progress and its eventual paroxysm, is beyond almost any effort of deception which the mind can conceive. To suppose, then, that it would be feigned by one intending to commit an outrage, as the most convenient means of doing so with impunity, is utterly extravagant. As respects the second reason, we hold it still less applicable to the case under consideration. This state could not be induced at the will of the intentional criminal; nor if it could, and the zeal of the individual was sufficient to induce him to hazard his life in such a project, could it be subjected to his control, and made subservient to his views. The notion of *design*, therefore, in its production, is entirely too absurd for serious refutation.

'But if it is said we must *prove* the maniac *a potu* to have been actually insane, in order to entitle him to the consideration claimed, the demand is unquestionably reasonable and just. Whether the prisoner was or was not so, in any particular case, is matter of evidence, and must be decided by proper testimony. In regard to this point, there is an important distinction, which has been often made, and which is laid down with sufficient precision by Dr. Drake. Unless it appear in evidence by the actions of the prisoner, that in regard to a particular subject or train of ideas, his reason was actually perverted, and farther, that the murder, or other outrage, was the consequence of this particular perversion,—was committed in accordance with the false premises and erroneous notions thus adopted,—unless both these points were clearly made out, he should be held guilty. On all but the particular subjects of his phrensy, the maniac is a moral agent, and responsible to the laws; and if he perpetrates a criminal action, aware of its nature, and conscious of the outrage he commits, he makes himself a subject for the penalty of these laws.

'We would add one remark, which, though not essential to the argument, will tend to illustrate still more strongly the distinction between delirium tremens, and the paroxysm of intoxication. It has been said that drunkenness does not impair the judgment, except as it inflames the passions, and exhibits them in a true though stronger light. As, then, violent passion from moral causes furnishes no excuse for the actions committed under its

influence, similar excitement from a physical cause ought to be viewed in the same light. "Ebrietas omne crimen incendit et detegit," and if the drunkard is only exhibiting his true character, stripped of the disguise which in his sober intervals he is able to throw over it, he is not the less a moral agent, and answerable for his conduct. Something like this is a strain of argument, adduced seriously, *we presume*, by the learned commentator on the Pandects before quoted. "Etsi vero tale propositum talisque machinatio præmeditata non est in illis qui impetu peccant, non tamen dolus in universum deest; nam et homicida impetu peccat, non modo cum justi sed et cum injusti doloris impetu, et sub iræ motu ad cædem procedit." (*Voet* xlviii. 10. 1.)

'Whatever may be thought of the soundness of this philosophy in view of the ebrious paroxysm, it is evident that it does not at all apply to the subject of delirium tremens. *He* exhibits nothing of that exaggerated state of the passions, of that boisterous violence which marks the drunken man; he is timid, watchful, and jealous; and much more disposed to apprehend injury from others, than wantonly to inflict it on them. Such was the state of the individual in the case alluded to, and surely there is none which renders a man more truly and deservedly an object of compassion.

'Judging of the case, then, on these principles, we have no hesitation in saying, that the act of the prisoner was the act of a madman. The idea which constantly presented itself to his mind, was that of a plot formed against his life, which placed him in continual and imminent danger. Under this delusion, he threatened his wife with a speedy punishment, if she did not desist from her purpose. From these premises he drew the conclusion, that the destruction of his supposed enemies was an act of self-defence, and on this conclusion he acted. No case of mania could be more perfect in all its parts, or present a stronger claim to forbearance and mercy.

'We conclude, then, that the law which makes the drunken man responsible for his actions is, both in its principle and its policy, wholly inapplicable to the case of the maniac *a potu;* and that the latter is entitled to all the privileges which madness, under any circumstances, can confer on its unhappy subject. We would add what we consider an equally important inference, that the treatment of this form of mania ought to be regulated on the same principles as that of any other. The case above cited is a melancholy proof that maniacs of this description require the constant vigilance of friends, to prevent them from doing mischief to themselves or those near them. We are satisfied that the amount of care bestowed is in many instances wholly insufficient, and that great hazards are frequently incurred from indulging the notion that the subjects of this delirium are altogether harmless.

There are two rules in regard to persons in this situation, which ought to be rigidly adhered to; one, that they be never suffered to go abroad alone; and secondly, that they should never be left in the care of female relatives. That both these precautions are often neglected with impunity, we are well aware; but this by no means disproves the existence of the danger; and the occurrence, in a single instance, of the horrible consequences above related, affords a warning which we hope will not be disregarded.' *Boston Med. and Surg. Jour.* pp. 568—572.

Art. II.—TESTIMONY OF PERSONS INTERESTED IN A SUIT.

Whether persons interested in the event of a cause, ought not to be rendered competent witnesses on the trial thereof before a jury.

The discovery of truth is admitted by all to be of the highest importance in every department of science and every pursuit of life. The noblest efforts of the human mind have been exerted in innumerable modes to obtain it; and those who have been most successful in their researches, may justly be considered the greatest intellectual benefactors of mankind. The *fountain* of truth is always pure; the essential difficulty is to find those streams which are least polluted by the thousand channels through which it is conducted to the mind. All channels, however, should be examined for the purpose of finding the treasure of which we are in pursuit; the *gold* must be separated from the surrounding substance and impurity; and the labor will not be in vain.

Perhaps no department of the law presents a greater variety of questions, often difficult and perplexing, than that which has relation to the competency of witnesses, against whom the objection of interest in the event of the depending suit has been made; and yet new cases are constantly presented for decision; every new volume which appears furnishes new distinctions and refinements; and we seem to be now as far from certainty as we were in the year 1789, when the important and leading case of Bent *v.* Baker was decided, reported in 1 Durnford & East. That case firmly *established* a distinction, which different judges often gladly admitted before in

advancement of justice, between an *interest in the question* in controversy and an *interest in the event of the cause.* According to the principle of that case, a witness is admissible, although interested *in the question,* if he is not interested *in the event of the cause.* Since that decision, the practice has generally been in conformity to it. Still the question is continually recurring, whether a witness who is offered, is, in the peculiar circumstances in which he stands, interested in the event of the suit.

In examining the question at the head of this article, we must remember that witnesses, like all *other* persons, are under the influence of feelings, wishes, passions, prejudices, principles, education, and respect for themselves and the cause of truth and justice, in a greater or less degree. Some have an exalted sense of religious obligation and are ever disposed to act conscientiously under the influence of virtuous feelings and principles; and as far as in their power, promoting the interests of truth and justice; while others are governed by motives, passions, and principles, which endanger the rights of others and even expose them to ruin, when placed within their control. How far the influence of virtuous or vicious dispositions and principles is felt by a witness, and how far he governs himself by their dictates, is always a question to be settled by a consideration of all attending circumstances; and not by any one uniform and unbending rule of law, however wise in itself or however carefully applied. It is not pretended that in the administration of justice, *general* principles and rules must not be adopted and applied in a great variety of instances, though sometimes operating severely on individual cases and interests: the true reason is, because the advantages resulting to the community from the establishment of the principles or rules, are superior to, and of more importance than any individual injury which they will occasion.

As, in the investigation of *facts,* the great object in view is to discover the *truth,* that process which is best adapted for the purpose must be acknowledged by all to be the most judicious and eligible. Experience has proved that the principle established in Bent *v.* Baker, is a wise and salutary one. The cause of truth has been promoted by it; and the light which, under its operation, has been permitted to lay open to view many interesting facts in the trial of a cause, has rendered the decision of that cause more conformable to the soundest princi-

ples of justice. It cannot be denied that a witness who is *interested in the question*, often testifies under as strong feelings, wishes, and prejudices, as he who is *interested in the event of the suit*; yet, as the jury are made acquainted with the circumstances in which he stands, and are at liberty to estimate the value of his testimony accordingly, no evil consequences have followed from the adoption of the principle; and no complaint from any quarter has ever been whispered against its uniform application. As one great improvement has been made in the law of evidence and administration of justice in the instance abovementioned, why is there not as good reason for advancing one step further, and as little danger in so doing, and under the authority of a special statute, admit persons as *competent* witnesses on trial, although interested in *the event of the cause*. The fact of such interest would be made known to the jury, and they would weigh the testimony in the same scales in which they would weigh all the other evidence, and with the same accuracy; and fairly estimate its value, taking into consideration his interest, his understanding, his character, his manner, and the agreement or disagreement of his testimony with that of the *other* witnesses in the cause? The answer given in our law books to this inquiry, is, that interested witnesses 'are excluded from a supposed want of integrity.' And Chief Baron Gilbert says, 'When a man who is interested in the matter in question, comes to prove it, it is a ground of *distrust*, rather than a just cause of *belief*, for men are generally so short-sighted, as to look at their own private benefit, which is near to them, rather than to the good of the world which is more remote: therefore, from the nature of human passions and actions, there is more reason to *distrust* such a biassed testimony, than to *believe it*.' Thus we see that this exclusive principle is founded on the *assumed* fact that *all* men are *equally* destitute of that integrity, which is presumed to secure them from perjury and prevarication, when testifying in a cause in favor of their own pecuniary interest. With all due respect, this seems to be a very harsh presumption, and indeed an impeachment of society. To soften the charge, however, and rescue the better portion of mankind from such an imputation, it is said that the principle of exclusion must be *general*, nay, almost *universal* in its operation, and applied in those cases where the interest is minute as well as in those where thousands are involved, because it is impossible for the

presiding judge to make distinctions between man and man, admitting *one* as a competent witness, and excluding another, on account of his character in respect to integrity and moral worth; or to decide how far the *amount* of interest may affect different minds in a different manner, or to graduate the influence of interest under any circumstances. All this reasoning may be admitted to be correct, without prejudice to the doctrine which this discussion is attempting to maintain. Still it is apprehended that it does not prove the correctness of the *exclusive principle.* It is true, the presiding judge may not be able to draw the line of distinction and the conclusions abovementioned; and for a very obvious reason, which is simply this,—the *amount* of influence, if any, arising from interest, and its effect on the mind of the witness, is not a question of *law,* but of *fact;* and it should, therefore, on principles of analogy, like all *other* questions of fact, be submitted to the consideration and judgment of the jury—the proper tribunal to settle it. What can be the objection to this course of proceeding? Cannot the jury be trusted as safely with the testimony of the witness when he testifies under the influence of an interest in the *event of the cause,* as in *the question* in trial? The same process of reasoning and deciding will be made use of by them in both cases. Could there be any possible danger in permitting a man of unquestioned veracity, integrity, and good morals, to testify to important facts in a cause, merely because his interest to the amount of a dollar may be affected by the verdict? Would not the cause of truth and justice evidently be advanced by such a course? But without multiplying these inquiries, let us see what is the province of the jury where the witness is deeply interested *in the question,* and of course, testifies under strong feelings and wishes in favor of the party who has called him? In such cases the court observe that the credit of the witness is a subject for the consideration of the jury; and they, as has been before observed, are to judge from all the facts and circumstances of the case, how far the witness is entitled to consideration and credit in the situation in which he is placed. Juries are constantly in the habit of doing this without any difficulty; and it is precisely what they would be called on to perform, if a person interested in the event of the cause should be sworn as a witness. There is no distinction between the cases, either as to the supposed *danger* of submitting the question of influence and credit to

the jury, or supposed *difficulty* as to their drawing correct conclusions as to the value of his testimony.

Again. Is there any more danger or impropriety in permitting a witness to testify in favor of his own interest, or in a cause where that interest must be directly affected, perhaps to a trifling amount, than an only son in support of his father's title to a valuable estate which he has every assurance will soon descend to him on the decease of the father? Yet in such a case the son is a competent witness, and the success of the cause and the establishment of the father's title may wholly depend on the testimony thus given. All that can be said is, his *credit*, under the tempting circumstances of the cause, is a proper subject for the consideration of the jury. The same observations are, to a certain extent, applicable to the case of a parent testifying for or against a child, or a child for or against a parent; or a person laboring under the dominion of malice and revengeful feelings for or against the object of his hatred and resentment. Within the range of this same remark we may also consider the case of a witness, whose general character for truth is assailed; as well as that of an *accomplice*, whose situation renders him a very suspicious witness. Yet in all these cases, the duty of the jury is very plain, and it is easily performed; and it is believed that the administration of justice is not the less effectual, salutary, and acceptable, because these depreciating circumstances and considerations are allowed to have their proper influence on the tribunal appointed to draw inferences and settle facts.

The more this subject is examined, the more clearly it will be perceived that there is an inconsistency in the theory and practice of the law in relation to it. The strictness of the general principle of exclusion has, by virtue of legal decisions, been dispensed with, in certain cases, on the ground of *necessity;* and persons interested have been admitted as competent witnesses, such as servants, brokers, carriers, &c. &c. So also in some cases persons immediately interested are by statute declared to be competent witnesses; such as inhabitants of towns and parishes, and members of certain other corporations, in causes where such towns, parishes, or corporations are parties or interested. In all these cases, such witnesses are at once deemed worthy of credit, and they are generally believed, unless disbelieved in consequence of other objections to their moral character. In these instances the *reason* of the

common law principle of exclusion, as mentioned by Chief Baron Gilbert, seems to disappear and be forgotten in a moment. How is all this to be accounted for? The statute in the cases abovementioned, and the adjudications dispensing with the principle of exclusion in certain cases of *necessity*, have only changed a pre-existing general *principle of law;* they have not changed the character of the witness, purified his morals, increased his integrity, or affected his credit; they have left all these subjects as worthy of the consideration of the jury, and proper for their decision.

There is another inconsistency respecting the subject under consideration, which is deserving of particular notice. If there is so much danger in permitting a person, interested in the event of a cause, to testify as a competent witness, as the existing rule of law presupposes, what shall we say of the course of proceeding in chancery, when the defendant himself is obliged to make oath to his answer? A court of equity is considered as better calculated, in numerous instances, than any other human tribunal to eviscerate a cause, unravel its intricacies, and draw forth from concealment and darkness into open day, a great variety of facts and circumstances which are of vital importance in arriving at a just decision. These advantages are often gained by means of those searching interrogatories which a defendant is bound to answer under the solemnity of an oath. Here the appeal is made directly to the conscience of the *party himself;* and surely no one can be more interested than he is; and yet this is considered as an important privilege, and happily adapted to advance the interests of truth and justice. Here the defendant not only testifies in his own cause, but the allegations contained in his answer the court are bound to consider *as true*, unless controlled by the testimony and proof on the other side, and effectually disproved. Is not this course of proceeding, and are not the principles by which it is regulated, inconsistent with the theory and the practice in the courts of common law as to the exclusion of an interested witness, on the ground that his testimony is rather a subject of *distrust* than *belief?* In *one* case a man is not permitted to be sworn, because confidence cannot be reposed in his integrity; in the *other*, the appeal is made directly to his integrity, and he is solemnly called upon to declare the truth under the sanction of an oath. In a court of equity, it is true, the *plaintiff* by his bill calls on the defendant to an-

swer under oath, and of course he must receive the answer as true, unless he can prove it to be otherwise; but still the course of proceeding is founded on the idea that the oath of a party is of high importance, and entitled to high respect, not only from the plaintiff, but from the court.

Some distinguished names might be mentioned in support of the principles contended for in this examination, but they are purposely omitted; the object being to present the question, uninfluenced by any authority, and resting simply on its own merits. It is a question of mere expediency; if it would be an advantage to the community, and contribute to the developement of truth and the consequent advancement of justice, it would be the part of wisdom to abolish the principle of exclusion by statute, and thus render the law of evidence, on this particular subject, more uniform and liberal; and at the same time simplify the administration of justice, by permitting a jury to estimate all testimony according to its value, and, in so doing, make those distinctions as to personal character and moral worth, in a court of law and the trial of a cause, which we are all constantly making in the walks of social life, and according to which we regulate our friendships, limit our confidence, and guard our interest.

Art. III.—SHIPS AND SHIPPING.(*a*)

District Court of the United States, } *June Term*, 1828.
Maine District, }

Joseph Drinkwater et al. v. *The freight and cargo of the brig Spartan; Jacob Quincy and Chs. Fox, Joseph E. Foxcroft, Robt. H. Thayer*, Claimants.

A libel on a charter party for freight due is a cause of Admiralty and Maritime jurisdiction; and a court of Admiralty has cognizance of the cause provided the penalty is not demanded.

The circumstance that the instrument is under seal does not take away the jurisdiction which the court has over it as a maritime contract.

The Admiralty has a general jurisdiction to enforce maritime loans.

The ship owners have a lien on goods for the freight due for marine transportation, which may be enforced in the admiralty by a libel *in rem*.

(*a*) This case and the succeeding one were originally published in the Eastern Argus. As they involve principles of interest and importance, which are discussed with great learning and ability, we have thought that we should be rendering a service to the profession, to present them in a form more convenient for reference, and more likely to ensure their preservation than the columns of a newspaper. *Ed. Am. Jur.*

And it is immaterial whether the contract is by a bill of lading or a charter party.

But where by the terms of the contract the charterers have the possession and control of the ship, the charter-party is not a contract for the transportation of goods, but it is a letting of the ship, and the charterers are considered as owners for the voyage.

In this case the general owners have no lien on the cargo for the hire of the ship.

Where by the terms of the contract a ship was chartered for a voyage to be made by the charterers from Portland to the Western Islands and back to her port of discharge, they to pay the expense of victualling and manning, and all port charges, &c. and to deliver her up to the owners on the termination of the voyage, it was held that the possession was with the charterers, and they were owners for the voyage, notwithstanding one of the owners was named in the charter-party as at present master.

The master has a lien on the freight for his necessary disbursements for incidental expenses and the liabilities which he contracts for these expenses during the voyage, and also for his own wages.

Where the charterers of a vessel failed before the termination of the voyage, and transferred all their property to assignees in trust to pay their creditors, including the cargo on board the ship, and it appeared that the freight due on the merchandize taken on freight was exhausted by prior claims, it was held that the master's wages were a privileged claim against the merchandize he had brought home for the charterers, and that he was entitled to a satisfaction out of it before it went to the general creditors.

This was a libel on a charter-party, by the terms of which the owners let to freight the whole of the vessel with her appurtenances, for a voyage to be made by the charterers to one or more ports in the Western Canary and Madeira Islands and back to her port of discharge in the United States and to Portland. The owners covenanted that in and during the voyage she should be tight, stanch, and strong, and sufficiently tackled and apparelled for such a ship and voyage, and that it should be lawful for the charterers or their agents or factors, as well at Portland as in foreign ports, to load and put on board such loading and goods as they should think proper, contraband excepted. On the part of the charterers it was agreed that they should pay for the full freight or hire of the brig one dollar per month during the time of the service, in thirty days after the termination of the voyage, and pay the charge of victualling and manning, and all other charges, and deliver her, on her return to Portland to the owners or their order. The charter-party is dated the 12th of Sept. 1827; the brig performed the voyage and returned to Portland the 25th of April 1828, with a cargo, part of which was taken on freight and part shipped on account of the charterers. One of the owners is named in the charter-party as master, but he being unable to go in her when she was ready for sea, a new master was appointed. A question of fact about which the parties

were not agreed, was, by whom the new master was appointed; but it appeared from the evidence, though the owners were desirous that the person who finally went as master should be the man, that the right of appointing him was claimed and exercised by the charterers. Before the return of the vessel the charterers having become embarrassed in their business, made an assignment of all their property, including this cargo, to Messrs. Quincy & Fox, in trust, to pay their creditors in a certain order of preference fixed by the terms of the assignment. The property was also attached immediately on its arrival by several creditors of the charterers. This libel was filed for the purpose of recovering the amount due on the charter-party from the freight, of that part of the cargo taken on freight, and from that part of the cargo directly which was shipped for the charterers. The master also claimed a lien on them for his wages.

Claims were interposed by the assignees, by the sheriff, and by a Mr. Thayer, each setting forth their title to the property, but the merits of these conflicting claims were in a course of litigation before the State courts, and it was unnecessary to decide upon them in this case. The questions raised in this case were, first, whether under this charter the owners of the vessel had a lien on the freight and cargo for the charter, and secondly, whether the master had such a lien for his wages. They were very elaborately argued at the June term, and the case held under consideration to July 1, when the following opinion was pronounced.

Emery, and *C. S. Daveis* for the libellants. *Longfellow* for Messrs. Quincy & Fox. *Fessenden & Deblois* for Foxcroft.

Ware, J. This is a libel by the master and owners of the brig Spartan, founded on the charter-party, and brought for the purpose of enforcing the stipulated hire of the vessel from the freight and merchandise. The master and owners of the ship have united in the libel, and there is a distinct allegation by the master claiming a lien also on the freight and that portion of the cargo which was owned by the charterers, for his wages. Whatever objections to the union of these different causes of action in one libel may exist in point of law, they were considered as waved by the counsel, and of course the attention of the court has not been directed to this subject. The other points in the case have been argued with distinguish-

ed ability, and justice requires me to acknowledge the very material aid I have received in examining the case, from the thorough and acute discussion of all the questions it involves, in the learned and copious arguments of the counsel on both sides.

A preliminary objection is urged by the respondents to the jurisdiction of the court, which must be disposed of before we can approach the case on its merits. It might be sufficient for this court, in claiming jurisdiction over the case, to refer simply to the decision of the Circuit Court in the case of De Lovio *v.* Boit, 2 Gall. 398, in which the whole learning on the vexed question of extent of the admiralty jurisdiction is completely exhausted. In that case the jurisdiction of the admiralty over bills of lading and charter-parties is distinctly asserted, and as that was a decision of the appellate court, which has the authority to correct the errors of this, it is beyond question binding upon me, unless it has been reversed by the Supreme Court. The case of De Lovio *v.* Boit, has I know in a recent case been questioned by one of the judges of that court, Mr. Justice Johnson, in 12 Wheaton R. 611, Ramsey *v.* Allegre, but the court left its authority untouched. That decision, therefore, I should hold still to be binding here, if I did not in my private judgment concur, as I most fully do, in the doctrines maintained in that very learned and masterly opinion. It has been now for twelve years before the public, and though several attempts have been made to answer it, I have yet seen none in which the reasoning is met or the conclusions shaken.

The question now before me was not then in judgment before the Circuit Court; and as it was not a point directly decided, the counsel for the respondent has urged the objection as one still open to argument. Without falling back on the authority of that case, I feel no objection to meet the question and give my own opinion on the point now in controversy. The argument is that this is a sealed contract, and that the admiralty cannot take cognizance of a contract under seal. The 2 Brown's Civil and Admiralty Law, 96, is referred to as confirming this doctrine. That the courts of common law in England will grant a prohibition in such a case is admitted. It has long been the established law of that country and is not now to be controverted. Howe *v.* Nappier 4 Burr, 1944; 1 Strange 962; 1 Salk. 31. But I considered it as equally well established, that the decisions of the common law courts

in England, as to the limits and extent of the admiralty jurisdiction, have not an authority in this country beyond the reasons on which they are founded.

Every admiralty court in this country probably, most of them certainly, have in repeated instances taken cognizance of cases in which a prohibition would go in England. Without multiplying citations I will refer to one or two only. The case of the Gen. Smith, 2 Wheat. 432, was a suit by material men and not the slightest doubt was expressed of the jurisdiction of the court. It was again positively and distinctly asserted over that class of causes in the St. Jago de Cuba, 9 Wheat. 409. Yet it is perfectly clear that a prohibition would go in these cases to the High Court of Admiralty. The contract is both made and executed on land and within the body of a county, either of which circumstances is held to be conclusive by the courts of common law against the admiralty jurisdiction. This court must, therefore, in deciding this point, be governed by the nature of the case, and the decisions of our own courts. No case directly in point has been cited at the bar or is recollected by me.

The first thing to be considered in deciding the question, is the subject matter or consideration of the contract, whether maritime or not. It is the hire of a vessel for maritime service, and the whole service, from its inception to its termination, is on the high seas. The Judiciary Act, *Laws of the U. S. vol. 2. ch. 20, sect. 9*, gives to this court 'exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction.' I shall be glad to hear any definition of causes of admiralty and maritime jurisdiction which will exclude this.

The counsel do not, however, put their objection on this point. They rely on the fact that the contract is under seal. But if the jurisdiction attaches to the subject matter, is it defeated by the peculiar form which the parties have chosen to give to their contract by annexing to it a seal? The reason given by the common law courts of England for ousting the jurisdiction of the admiralty in such cases is, that this court is governed by the civil law and requires two witnesses to prove a deed, when the common law is satisfied with one. Smart *v.* Wolff, 3 T. R. 348, Mr. Justice Buller. If that is the rule of the Admiralty in England, it may be a good reason for prohibiting the court from taking cognizance of sealed contracts. In this country a deed is proved in the Admiralty by the same

evidence that is held to be sufficient by the courts of common law, and is interpreted by the same rules. The reason, therefore, which may be good in England fails here, and *cessante ratione cessat lex.* Yet the rule is flexible in England, for there the Admiralty has an undisputed jurisdiction over bottomry bonds. In fact though Brown in the place referred to in the argument, does state the law of England to be as is contended, that is, that a prohibition will go from the common law courts, yet in a subsequent part of the same chapter he says that if a suit is instituted in the admiralty on a charter-party for freight, he does not see how the court could refuse to entertain it, p. 122; and the case of the Jenny, cited in the same volume, which was a decision of the court of admiralty in Ireland, is directly in point to sustain the jurisdiction, p. 535. The court ruled that the jurisdiction of the admiralty was excluded only when the penalty was sued f[illegible]

But there is another ingredient in this case which I hold to be conclusive in favor of the jurisdiction. I yield to the argument, which was very forcibly urged in another case as well as in this, that this court has a general jurisdiction to enforce maritime liens. I assume the fact in this stage of the inquiry, which is supposed by the suit, and on which it rests as its only foundation, that a lien is created by the maritime law. If there is here an implied hypothecation raised by the law it can be enforced by no other than an admiralty court. It is a right adhering to the thing, a *jus in re* which is to be made available by process against the thing *in specie.* It was admitted by the learned counsel for the respondent, that the course of the common law allows of no process upon the hypothecation by which the subject itself is directly reached and a satisfaction for this right extracted from it. If a court of admiralty cannot entertain jurisdiction of the case, then the law has given the right, it has provided the security, but has refused the only means by which it can be rendered with certainty available. It holds out the right, and holds back the remedy.

The libellants assume the fact that theirs is a privileged debt, and for the decision of this point in the case it must be admitted to be true. They claim the right to be paid out of the property, for which the service has been rendered and by which its value has been augmented, before any part of it goes to the general creditors. And when they apply to the only

court which can put them in possession of their rights, shall they be told that this court has no jurisdiction of the case? Shall they be told that the law sanctions their privilege and holds it sacred, but refuses to them the power to enforce it? Until I am otherwise instructed by the authority of a higher court, I shall not willingly admit that the law thus 'palters in a double sense, and keeps the word of promise to the ear, while it breaks it to the hope.' On the contrary, where the law raises a lien for a maritime service, I hold that this court has the power to carry it into effect.

We come then to the case on its merits. The general right of the master and owner to retain the merchandise for the freight due upon it has not been denied. It is too well established to admit of doubt. It is a principle of the general maritime law, the common law of the commercial world, sanctioned by all the maritime codes, ancient and modern, and confirmed by numerous decisions of the highest courts both in this country and England. Nor does there appear to be any difference in principle, nor is any recognised in law, whether the merchant takes the whole vessel by a charter-party, or sends his goods in a general ship. The lien of the owners is as perfect for the hire of the vessel stipulated in the charter-party, as it is for the freight stipulated in the bill of lading. In both cases the claim is privileged in the same degree and to the same extent. They are contracts of the same general nature, differing only in some unimportant particulars. A charter-party is for the whole or a large and specified part of the vessel; a bill of lading is usually for a smaller and an indeterminate portion of the vessel's capacity. Both contracts, in one aspect, are the hire of the whole or a part of a vessel, both, in another, are contracts for the transportation of merchandise. *Boucher Droit Maritime, par.* 879. In both cases the owner is the carrier, and he has a lien on the merchandise for the transportation.

There are, however, two kinds of contracts passing under the general name of charter-party, differing from each other very widely in their nature, their provisions, and in their legal effects. In one the owner lets the use of his ship to freight, he himself retaining the legal possession and being liable to all the responsibilities of owner. The master is his agent, and the mariners are in his employment, and he is answerable for their conduct. The charterer obtains no right of control over

the vessel, but the owner is in fact and in contemplation of law the carrier of whatever goods are conveyed in his ship. The charter-party is a mere covenant for the transportation of merchandise or the performance of the service which is stipulated in it. In the other, the vessel is herself let to hire, and the charterer takes her into his own possession. It is a contract for a lease of the vessel. The owner parts with possession and the right of possession, and the hirer has not only the use but the entire control of the vessel herself. He becomes the owner during the term of the contract. He appoints the master and mariners, and is responsible for their acts. If goods are taken on freight, the freight is due to him, and if by the barratry or other misconduct of the master or crew, the shippers suffer a loss, he must answer for it. If he ships his own goods he is his own carrier.

Under a charter-party of the former description the charterer may hire the use of the whole vessel, and it may be employed in carrying his own goods or the goods of other merchants on freight. His own goods become liable to the owner of the vessel for the charter to the full extent of their value, and though he is entitled to the freight of the goods shipped by the sub-freighters, the owner of the ship has a lien on that freight for the charter of the vessel; and his lien extends to the goods of each sub-freighter for the amount of freight due on his shipment. This was the decision in the case of Paul *v.* Birch, 2 Atkins, 621, and it has ever since been held to be law. *Holt, Law of Shipping*, 471. It is so recognised in Christie *v.* Lewis, 2 Brod. and Bingh. 410, and in Faith *v.* East India Co. 4 Barn. and Ald. 630.

In a charter-party of the second kind, not only the entire capacity of the ship is let, but the ship itself, and the possession is passed to the charterer. The entire control and management of it is given up to him. The general owner loses his lien for freight, but the lien itself is not destroyed; the charterer is substituted in his place, in whose favor the lien continues to exist when goods are taken on freight. But the general owner has no remedy for the charter of his vessel but his personal action on the covenants of the charter-party. It is a contract in which he trusts to the personal credit of the charterer. These principles appear to be firmly established by the cases cited at the argument. It was on this principle that the case of Hutton *v.* Bragg, 2 Marsh. Rep. 339, was

decided; and afterwards that of the Master of Trinity House *v.* Clark, 4 Maule and Selwyn, 288. The authority of these cases, especially the former, was indeed powerfully attacked in the very able argument of the libellants' counsel, and it may be considered as in substance overruled by that of Saville *v.* Campion, 2. Barn. & Ald. 503, and still more decisively in that of Christie *v.* Lewis, 2. Brod. & Bing. 410. But on an examination of the cases in which the authority of Hutton *v.* Bragg has been called in question, it will be found that they have rather overruled the case than the principle. The application of the principle as made in that case has been shaken, and not the rule of law which the court professedly assume as the ground of their decision. The principle is that when the owners let the entire ship and part with the possession, they lose their lien for freight. The application of the principle is, that when the owners let the whole ship or nearly the whole by a charter-party containing certain *technical terms of demise*, the legal possession passed to the charterer, notwithstanding the general owner appointed and paid the master and crew. The Court interpreted this to be a contract not for the transportation of goods, but for the lease of the vehicle. The case of the Trinity House, though agreeing in the terms of the charter-party with that of Hutton *v.* Bragg, is distinguished from it in the nature of the service for which the ship was hired, and may well be defended on its own peculiar circumstances. But the case of Christie *v.* Lewis, agrees in all its material facts with Hutton *v.* Bragg, yet the Court, Dallas, Chief Justice dissenting, reversed the decision and held that the owner retained his lien. But it was so ruled on the express ground that the owner retained the legal possession of the ship by his master and crew. In this case as well as in that of Faith *v.* the East India Co. it is clearly admitted that when the owners part with the possession they lose their lien. The principle of Hutton *v.* Bragg remains untouched, but the rules of interpretation applied to the charter-party in that case are overturned. All the English cases are reviewed by Holt, *in his Law of Shipping*, 460—471, and the result of the whole is, that a ship may be so let to hire as to constitute the charterer owner under the charter-party, provided such appears to be the intention of the parties; and that this intention may be collected either from the necessary construction of the terms of the instrument, or from the nature of the service for which

she is hired. But the right of the owner is strongly favored, and while he appoints the master and crew, his lien for freight can only be excluded by the most express and absolute terms of the charter-party or by unavoidable implication. But there is no case where the owners' lien has been sustained, unless where he has retained the possession by the appointment of the master.

No American case was cited in which this point has come up directly in judgment. But in Kleine *v.* Catara, 2 Gall. 68, Mr. Justice Story expressed a decided opinion that where the charterer becomes owner for the voyage the general owner has no lien for the freight, but that the rule is confined to cases where the carrier for freight is owner for the voyage. I think it clear both in principle and authority, that where the owner parts with his possession, he parts at the same time with his lien.

This case therefore must turn wholly on the question, whether the general owners or charterers are to be considered as owners for the voyage and as having possession of the ship.

The language of the charter-party leads very clearly, if not unavoidably, to the conclusion that this was a letting of the ship. Violence must be done to several parts of it, before it can be interpreted into a contract on the part of the owners for the conveyance of goods. It is not simply a letting of the whole ship; this it is admitted would not alone be conclusive, but she is let for a voyage to be *made by the charterers.* The owners covenant, not that they or their master will receive and load the merchandise provided by the charterers, but that it shall be lawful for the Quincies or their agents to load her; and the charterers agree, not only to pay the charter, but also the charges of victualling and manning and all other charges, and finally after she has performed the voyage to deliver her up to the owners. It would seem that language more expressive and significant of an intention on the one side to part with the possession, and on the other to take the possession of the ship, could scarcely be found. How could the charterers perform their covenant to deliver up the possession to the owners after the voyage was completed, if the possession was not to be in them during the voyage?

The libellants rely on the fact that one of the owners is named in the charter as *at present master*, as a circumstance showing that it was the intention of the owners not to part with the possession. If the intention, as collected from the opera-

tive parts of the instrument, was doubtful, this might be entitled to weight, and the inclination of a court to support the equitable lien of the owners would give it all the weight it could justly have. But this of itself is not sufficient to control the general tenor and whole apparent intent of the charter-party. The appointment of the master and crew by the owners is not in all cases conclusive, though they may also be paid by them. As is remarked by Lord Ellenborough, in the case of Trinity House *v.* Clark, the vessel may be hired and with it the services of a certain number of persons paid by the owners, and necessary to the use of the vessel. In point of fact, however, the master named in the charter-party did not go the voyage, though it was the intention of both parties that he should.

The libellants offered to introduce parol proof that the new master was appointed by the owners, but the counsel on the other side objected to the admission of this species of evidence to control the operation of the charter-party. The testimony was received, *de bene esse*, subject to the respondents' objection. It is unnecessary to decide on the influence which this fact ought to have, if proved, on the construction of the written agreement. The evidence in support of it is at best but loose and vague, while that by which it is met on the other side is direct and positive, that the new master was appointed by the charterers. Upon this part of the case my opinion is that the libel cannot be supported; that the owners parted with the possession of the vessel and constituted the charterers owners for the voyage, and that they have, therefore, no lien on the cargo for the charter. So much of the libel as claims a lien for the charter is dismissed. This, of course, can be no bar to any right of action which the owners may have personally against the charterers or their assignees.

This view of the question being in my opinion decisive, renders it unnecessary for me to examine other points which were made and strongly urged in the defence.

The master also claims in this libel a lien on the freight and cargo, that is, on that part of the cargo belonging to the charterers, for his own wages and as an indemnity for his liability to the crew for their wages. The decree which has just now been made on the libel of the seamen, is, I think, a sufficient answer to the claim of a lien as an indemnity. Whatever his rights may have been in this respect, it appears to me that that decree must be held at present as a full protection against his

liability to the seamen. Upon his claim for his own wages, I have found more difficulty in coming to a conclusion satisfactory to my own mind, than on any part of this case; and the opinion which I have adopted as most reasonable and equitable, I do not profess to hold free from all doubt. The books are extremely barren of authorities on this point.

It is a well settled principle of law in this country that the master has no remedy for his wages against the vessel. Whether this be a principle of the general marine law may perhaps admit of doubt. By the law of France the master is allowed the same privilege against the ship for his wages, and in case of misfortune against the savings from the wreck, as the seamen. This is the provision of the *Ordinance de la Marine*, L. 3. tit. 4, arts. 8 and 21; 1 Valin, 701 and 752, and this provision is continued in the Napoleon code. *Code de Commerce*, 352. I cannot see on what principle of justice or policy the master is to be excluded from all benefit from the savings from a wreck, while the right of the crew is admitted. But the general principle is too firmly established in this country to be called in question. 1 Paine's Rep. 73, The Grand Turk; 1 Peters's Ad. R. 228, The New Jersey. One reason assigned for making this distinction against the master is, that he contracts on the personal responsibility of the owners. But this, instead of a reason, is manifestly little more than another mode of stating the principle. Another and a more satisfactory reason given is, that he is the proper person to receive the earnings of the ship and pay them over to those to whom they of right belong; 1 Peters Ad. Rep. 229; and that he has a lien on this freight for his own wages. 1 Paine's R. 76. He is entrusted with the control and management of the vessel as the confidential agent of the owners, and is often, in the course of the voyage, called upon to incur responsibilities and make advances in the ship's service for their benefit. It is a necessity which arises from the nature of his employment. In cases of imperious and overruling necessity he may hypothecate the ship and even the cargo; but it is very questionable at least whether he must not first exhaust his own means and credit before he can resort to this extraordinary and onerous mode of relief. The Hero; 2 Dodson, Adm. R. 139, Holt's Law of Shipping, 342–3; Jacobson's Sea Laws, 354. Besides these incidental responsibilities, he is, according to universal usage, by the very terms of the contract, made di-

rectly answerable to the seamen for their wages; and this is in conformity with a rule of the marine law as old as the law itself. On what principle could this rule have been so universally established, but this plain and sensible reason, that the captain is entitled to receive the freight, the common fund out of which not only wages but every other ordinary charge on the voyage is to be paid.

In the case of Goodridge *v.* Lord, 10 Mass. Rep. 487, it is said by the court that the captain may retain freight in his hands to pay the seamen's wages; and in that of Lane *v.* Penniman, 4 Mass. Rep. 92, it is ruled, Chief Justice Parsons giving the opinion of the court, that he has a lien on the freight for the necessary disbursements which he makes during the voyage, which takes precedence of the owner's title to it. This decision is fully supported by that in White *v.* Baring, 4 Esp. N. P. Cas. 22. The captain had rendered himself liable for the amount of some repairs which became necessary in the course of the voyage, and the owners had become bankrupt before its termination. The shippers, after notice had been given them by the master of his demand against the freight, paid it over to the assignees of the owners. The master brought a suit against them for the amount of his liabilities, and also for his primage, which was purely a personal demand due to him as master. Lord Kenyon said that the captain 'having contracted and rendered himself personally liable for articles furnished the ship, he thereby acquired a lien on *the goods as well as freight*, that his lien is co-extensive with his liabilities to the ship's creditors, and of course the payment made by the defendants was made in their own wrong.' Lord Kenyon, in the short abstract of his opinion, avoids touching on the claim of primage, and in the brief report of the case it does not appear whether this was or was not included in the verdict.

I have no doubt of the soundness of the doctrine of these cases. Why does not his prior right for his wages rest on as good ground as for his liabilities or disbursements? The money is as much due to him in one case as the other, and the credit has in each grown out of the same service, a service which has contributed to create the fund against which his claim is made. I can see no sufficient reason for making a distinction between them. His wages are as much a charge on the earnings of the ship as those of the seamen, or as the advances which he makes for incidental expenses. What re-

mains, after these are discharged, constitute the net freight of the owners. Besides, if the reason given for excluding the master from admiralty process against the ship, that he has a lien on the freight, means any thing, it means that he is a privileged creditor against the freight. A lien *ex vi termini* imports a privilege. If it is not this, it is nothing. Upon the whole, finding that he has a lien on the freight for his disbursements, and seeing no reason in law or justice for making a distinction between this claim and that for his wages, I do not feel the authority for introducing a distinction against him which I do not find established.

But in point of fact the freight on the goods taken on freight had been attached before the filing of this libel, by the seamen, and a decree has passed in their favor which will absorb the whole fund. This necessarily brings up the other question, whether the master's lien for his wages extends to the merchandise of the owners which he has brought home. Without touching this as a general question, I put my opinion on the peculiar facts of the present case.

The charterers here are the owners for the voyage. The master is hired by them, and is in their employment. He fulfils his part of the contract and performs the voyage successfully, but when he arrives in safety, bringing with him his whole earnings for seven months' service, he finds that his employers, two months before the service is completed, without making any satisfactory provision for his wages, had assigned their whole property, including what was in his hands, for the benefit of their general creditors. It was in effect not only an assignment of all his wages earned up to the time of the assignment, but of all the additional wages which would accrue to the completion of the voyage. He is named, it is true, as a creditor in the assignment, but his claim is postponed to several more favored creditors to a large amount; in the meantime the fruits of his service are taken out of his hands, and he is left to pick up a satisfaction from the remnants of an insolvent estate.

This is certainly a case of very strong equity, but it is admitted that the books contain no decision in point to sustain the master's claim. In the argument it was compared to the lien of a factor for his commissions, and to the vendor's right of stoppage *in transitu* on the insolvency of the purchaser. It has some points of analogy and some points of difference

with both these cases. It is like the factor's lien, inasmuch as the goods are in his hands, and the claim is for a meritorious service to these goods; and it is assimilated to the vendor's right of stoppage *in transitu* by the insolvency of his employers, with this distinction in his favor, that the possession is with him, and he retains all the priority over other creditors which that can give. His case may also be likened to the lien which an artisan has, for his pay, on the particular thing about which he has expended his labor and skill, an equitable lien, which is always favored in law. It is repugnant to all our ideas of equity that the master should be required to part with these goods to the creditors of his employers, claiming either under the assignment or attachment, until he has a compensation secured to him for the time, labor, and diligence which he has bestowed for the benefit of this identical merchandise. It is on the principles of natural justice a charge on the specific goods, and the owner on his insolvency cannot, consistently with these principles, assign them but subject to the charge. Sitting in a court, which, while it adheres to the principles of law, is required by its duty to decide *ex æquo et bono*, and by its constitution is enabled to deal with the cases falling within its jurisdiction, in a larger and more liberal spirit of equity than the severe and technical rules of the common law will admit, after the most diligent examination which I have been able to give the case, I have come to the conclusion that I can do justice between the parties without impugning any of the rules of law, but consistently with those rules, and I accordingly decree in favor of the libellants' lien.

Art. IV.—SEAMEN'S WAGES.

District Court of the United States, Maine District, } *June Term*, 1828.

James Poland et al. Libellants, v. *The freight and cargo of the brig Spartan; Jacob Quincy and Charles Fox, Joseph E. Foxcraft, Robert H. Thayer*, Claimants.

The seamen have a lien by the maritime law on the freight as well as the vessel for their wages.

This lien is not taken away by the statute of the U. S. for the government of seamen in the merchant service, (vol. 2, ch. 56, sect. 6,) which allows process against the vessel.

When a ship is taken by a charter-party, by the terms of which the charterers are to bear the expense of victualling and manning, and they become the owners for the voyage, the seamen have a lien for their wages on the cargo shipped on the account of the charterers, for a charge in the nature of freight.

The charterers having become insolvent and assigned their property in trust to pay their creditors, among whom the seamen were named, it was ruled that their wages were a privileged claim against the cargo, which was to be preferred to the title of the assignees under the assignment, and to that gained by the attaching creditors, and that they were not bound to wait to receive their wages in the order fixed by the assignment.

When property is taken for security in the admiralty by a warrant of attachment, the attachment may be dissolved and the property restored to the claimant on his filing a stipulation, with sureties, according to the form used by the court.

THE facts upon which this case turns are few. William J. and Charles E. Quincy chartered the brig Spartan of Zadock Prince and others, owners, for a voyage from Portland to the Western Islands, and back to Portland. The charterers, by the terms of the charter-party, were to victual and man the ship, and bear all other charges, and pay for the hire of the vessel at the rate of one dollar per ton, by the month, in thirty days after the termination of the voyage. The crew were shipped by the charterers, who had the entire use and control of the vessel. She sailed on the 20th of September, 1827, performed her voyage successfully, and returned to Portland on the 25th of April last, with a cargo of 3806 quintals of barilla, and a few other articles belonging to the charterers. Of the barilla, 1616 quintals were shipped by a Mr. Thayer, on freight, and consigned to himself, and 2290 were shipped on account of the Messrs. Quincies. While the vessel was absent on her voyage, the charterers having become embarrassed in their business, made an assignment of all their property, including the return cargo of their vessel, to Jacob Quincy and Charles Fox, in trust, to pay their creditors in a certain specified order of preference. As soon as the brig arrived the cargo was also attached by sundry of the creditors of the charterers. No provision was made for the payment of the wages of the seamen, except in the order in which they stood on a schedule of creditors attached to the deed of assignment. On this, the claims of several creditors to whom the charterers were indebted to a large amount, were preferred to that of the seamen. To secure their wages they filed their libel, in which they claim to be paid out of the freight earned in the voyage, in the hands of the captain, and also for process against that part of the cargo which is owned by the charterers, that it may be holden to respond to them for the amount due for wages.

Several conflicting claims were interposed for the property, the merits of which are not involved in this case. No freight has been paid to the master by Mr. Thayer, but he has come in under the general monition as a claimant, and filed a stipulation for the amount of freight due on his shipment. The master, in his answer, admits the wages of the seamen to be due, and submits the case to the decision of the court; but their right to proceed against the freight is resisted by the assignees and by the sheriff in behalf of the attaching creditors.

Greenleaf and *Shepley* for the libellants. *Longfellow* for the assignees. *Fessenden & Deblois* for the sheriff and the attaching creditors. *C. S. Daveis* for Mr. Thayer.

The case was very fully argued at the June term, and was held under advisement to July 1, when the following opinion was delivered.

WARE J. This is a case novel in its form and important in the principles which it involves; and it has very naturally excited considerable interest among mercantile men for the direct bearing it has on the great shipping interests of the country. It has been argued with eminent ability on both sides, and it is but an act of justice on my part to acknowledge my obligations to the learned counsel, for the pleasure as well as the assistance which I have received in coming to a result, from the very elaborate discussion of the questions which arise in the case. In my examination I have attentively read all the cases and authorities cited at the bar, and have referred to some others having a bearing on the questions in litigation, which I have met with in my own researches.

This is a suit for mariners' wages, a subject familiar to the jurisdiction of the admiralty, but as far as my information extends, and as far as I have been informed by the learned arguments at the bar, entirely novel in its form. The case is admitted to be of the first impression, and, without any judicial decisions for our guide, the court is left to thread its way through with no landmarks to direct its steps but the general and leading principles of maritime jurisprudence. I have given to the subject the best consideration that is within my ability and means of information, and if I have been led to a wrong conclusion by false lights, it is a source of no little consolation to me that my errors can be corrected by a court to which the parties may appeal, with a perfect assurance that their rights will be thoroughly investigated in the final decision of the case.

The libel proceeds against the freight and cargo of the vessel for the wages of the mariners, that is, against the freight of so much as was taken on freight, and against that part of the cargo which the charterers shipped on their own account. It goes on the principle of a double maritime hypothecation, first that the cargo is hypothecated for the freight, and secondly that the freight is hypothecated for the wages. Both these principles are maintained by the counsel for the libellants, and it is further contended that the freight may be reached by the seamen, at least so much as is necessary to pay their wages, by a direct libel on the merchandise. Indeed the argument went the length of asserting a direct lien on the cargo for the full amount of wages; but however strong the language of the old maritime law may be, it may be doubted whether the lien, if it ever existed to the extent contended for, must not now be considered as limited to the amount of freight due upon it.

That the master has a lien on the cargo for his freight is a familiar principle of maritime law, not controverted by the respondents. It has been settled in numerous cases, and is laid down as a principle, not to be called in question, in all the elementary treatises. But while this is fully conceded, it was contended, in argument, that this is a mere naked authority to retain the goods for the purpose of compelling payment; and if the merchant chooses to suffer his goods to remain or to perish in the master's hands, that the law furnishes no process, that it confers on the master no right of proceeding judicially against the cargo to convert so much of it into money as will pay the freight. I have had occasion to examine this point in another libel against this cargo, and for the present I merely observe that in this libel, if the rights of the libellants are as they are contended to be by their counsel, I feel free to give them the remedy which they seek. If their lien extends to the merchandise, my opinion is, that this is the proper court to enforce it, and that they have elected the proper process by which to pursue their remedy. If it be admitted that the cargo is hypothecated for the freight, the next inquiry is, in what relation do the seamen stand to the freight.

Freight is the hire which is earned by the transportation of goods. This is the original and elementary signification of the word. It is due for the service which is rendered in transporting them from a place where they are supposed to be worth

less, to a place where they are worth more. This service has given to the merchandise a new value, which it had not before; as much so as is given by a tailor to a piece of cloth which he has made into a coat, or by any other mechanic when he has, in the way of his trade, changed the form of a thing and converted it into what is technically called, in the civil law, a new species. Though here has been no change in the form of the thing, yet there has been a service performed by which it has received a new and additional value, as certain and as distinguishable from its former value, as that which is given by a mechanic who converts one species into another. It is a general principle of law, extending to a great variety of cases, that a person who has, by his own labor, thus added a new value to a specific article, has a lien on the article for the value of his service. It is a right consonant to all our ideas of natural equity, and is highly favored by the law. 2 Kent's Com. 496. The mechanic is considered as gaining a qualified property in the article, when he has incorporated into it his own skill, care, and labor. Another general principle is, that when this sort of confusion of goods is produced at the request of the general owner, he that has given the last increment of value to the article, is entitled to be first satisfied out of the common stock. In the nature and reason of the thing there is no difference, in this respect, between the mechanic and the carrier.

In the case of marine transportation, by whom has this service been performed? The answer obviously is, by the vessel and crew jointly. Neither has an exclusive agency, but their service is concurrent. In the common sense and equity of the case, the crew and the vessel have a joint or partnership interest in the freight, and independent of positive regulation, special contract, or a usage that has the force of law, no distinction can be made between the title of the crew to the freight and that of the vessel or her owners. It is in its own nature as perfectly a joint or partnership interest as can be conceived.

The opinions now expressed are not new. If there be no adjudicated case directly in point, they are at least supported by the *dicta* of learned jurists, and are in harmony with the general analogies of the law. The freight is steadily looked to as the proper fund out of which wages are to be paid. 'In all cases,' says Holt, Law of Shipping, 275, 'the question of wages turns upon the same principles, whether the ship has earned her freight or not.' In a very late case, Lord Chief

Justice Abbot, in very decisive terms, lays it down as a fixed rule of the law of England, that where no freight is earned no wages are due. 'A seaman's wages,' he says, 'can only be recovered out of a certain fund, namely, *the freight earned in the voyage.*' Holt, Law of Shipping, p. 276, Brown *v.* Moates. The generality of this language must be received with several exceptions. But it serves to show how uniformly the eyes of English jurists are fixed on the freight as being, in the expressive language of the law, the mother of wages. Judge Winchester, in the case referred to in the argument, expressly says that the 'contract of the sailors is a species of copartnership between them and the owners. If all is lost, the sailors lose their wages; but if all is not lost, that which remains of ship and freight is a common property, pledged for the payment of wages. Freight gained and put on shore, is saved from a subsequent shipwreck. It goes into the common stock, but, like the savings from a wreck, is to the last nail or cable hypothecated to the wages. Freight is a trust fund in the hands of the owners, to be accounted for to those whose industry produced it.' 1 Peters's Ad. Rep. 194. The lien of the seamen for their wages is expressed here in terms as strong as language can furnish.

If the English books contain no adjudicated case directly in point, a satisfactory reason may be given for it. The common law courts prohibit the only court in which the lien can be enforced, from taking jurisdiction of the case. But the language of foreign writers on maritime law is clear and unequivocal. By the Marine Ordinance of Louis XIV. liv. 3, tit. 4, art. 19, the ship and freight are specifically pledged for the payment of the mariners' wages, and the principle is re-enacted in the *Code de commerce*, s. 271, in the same words. Valin, in his Commentary, says, that if the freight has been paid to the master, and he applies it to the payment of his private debts, there will remain to the seamen only their personal action against the master; they can neither recover it against the merchant nor against the captain's creditors, unless there has been fraud. They ought, he adds, to have taken the precaution to seize the freight in the hands of the merchant. 1 Valin 751. Boucher, a late writer of respectable character, on maritime law, quotes and approves the decision of Valin. But he takes a distinction. If the captain receives his freight in part of the merchandise, and this is transferred by him in payment of a

pre-existing debt, the seamen, he holds, can reclaim it in the hands of his creditors. His words are, 'The freight being pledged for the payment of the wages of the sailors, they have the quality of proprietors to the amount due to them; and they may consequently reclaim them in the hands of the captain's creditors.' Boucher *Droit Maritime*, part 3, sec. 7, par. 1159, 60—61. The reason of the distinction is that the pieces of money paid cannot be identified, a reason purely technical; but he expressly affirms that the hypothecation gives to the sailors a proprietary interest in the freight. The marine law also of Spain and Portugal render the freight as well as the vessel answerable for the wages of the seamen. Jacobson's Sea Laws, 150.

Roccus affirms the general principle in the strongest terms, and overrules the distinction set up by Boucher. 'Mariners,' he says, 'for their freights and wages have an implied hypothecation with right of preference on all goods laden on board; by which right of preference the sailors may recover money previously paid to other creditors.' *Ingersol's Roccus, not.* 91. This action he affirms to be always open to the mariners, and he refers to a case decided in Portugal and reported by *Pierera de Castro.* The same decision is cited by Valin and denied to be good law in the extent to which it goes. 1 *Valin*, 752.

The words of Cleirac in his Commentary on the Laws of Oleron are quoted by Abbot as constituting at this day an established principle of the maritime law, but as ineffective in England only because the court of admiralty, by which alone it can be made operative, is denied jurisdiction over the case. Law of Shipping, 135—6, Am. Edit. *By custom*, says Cleirac, *the ship is bound to the merchandise, the merchandise to the ship. Us et coutumes de la mer*, p. 72. By turning to 503 page of *Les Us et coutumes de la mer, Navigation des Rivieres*, Arts. 18 and 19, we shall find Cleirac himself explaining what is meant by this maxim of the marine law. 'The vessel,' says he, using the same terms, 'is bound to the merchandise, and the merchandise to the vessel; that is to say, if the merchant fails in the time of payment and causes delay, the master or mariners are privileged to cause the merchandise or goods which they carried to be seized, and to be sold to the amount that is due to them.' He then states the reciprocal right of the merchant to hold the vessel to respond for any injury to the merchandise occasioned by the fault of the master or ma-

riners. It may be said that this relates only to river navigation, and stands on the ground of a positive ordinance. I refer to it only as a definition of the words used in another part of his work, where they are applied wholly to maritime navigation. Again, in the *Jurisdiction de la Marine*, p. 351, he is treating of maritime navigation, and says, that the 'wages of the mariners are to be preferred in a decree against the *ship and merchandise* and over all other debts, so that should there remain but so much of the ship and merchandise, even to the last nail, they shall have it.'

It appears from Voet that by the law of Holland the seamen have a lien on the cargo as well as the ship, for their wages in foreign voyages, and he quotes Grotius as affirming this right as a general principle of maritime law. *Voet ad Pandectas*, L. 20, tit. 2, sect. 30.

I do not find that the Consulate of the Sea in express terms states that the freight is pledged for the wages of the mariners; but if we do not find the principle any where plainly implied, in many parts of this venerable ordinance we find its rudiments recognised. It is said that the master is bound to pay the mariners with the freight that he receives. *Consulat de la Mer. Boucher's trans.* 341. He is holden to pay the mariners immediately on receiving the freight, and in the same money that he receives of the merchants: s. 342. If the merchant, after his goods are laden, declines to send them, he is held to pay half freight, and in this case the sailors shall receive half their wages: s. 160, and 164, 5, 6. All these provisions seem to import an interest of the seamen in the freight. It is also provided that no caution or security can be given for the freight, though in every other case the consuls who have, by that ordinance, jurisdiction over maritime affairs, are authorized to order security to be taken. s. 50 and 500. The translator, in a note, observes that freight is singularly favored in this ordinance, because it is pledged for the payment of wages.

These authorities go the full length of affirming it as a general principle of maritime law, that the seamen have a direct hypothecary interest in the freight for the amount of their wages. Their lien on the freight is described in the same terms as their lien on the vessel; that this lien can be enforced by seizing the freight in the hands of the merchant before it is paid over to the master; that if the merchants refuse payment

they can proceed against the merchandise, and compel a judicial sale of so much as is necessary to pay their wages. It is not distinctly stated whether they can enforce their claim for wages against the cargo to an extent beyond the amount of freight which is due upon it. But I think upon principle this must be the natural and necessary limitation of their privilege, where the owner of the ship and cargo are different persons; except in those cases of misfortune where a claim of salvage is mixed with a claim of wages. The Cato, 1 Peters's Ad. R. 54, and the Catharina Maria, 2 Peters's Ad. R. 424, cited at the bar, were cases of this mixed character.

It is objected by the learned counsel for the respondents, that many of the authorities relied on at the argument, are either the positive enactments of foreign ordinances, or the *dicta* of foreign writers, which have not the force of law in this country. *Proprio vigore* it is true that they have not. But they have always been considered as high evidence of what the maritime law actually is; they are familiarly quoted in our courts of law, they are constantly referred to as of authority in our best elementary treatises, and are relied on by our highest courts of judicature, if not as express grounds of decision, at least as entitled to great respect in all cases involving the general principles of maritime law. In the very late case of the Neptune, which was a case of wages like the present, decided by Lord Stowell, in 1824, he overruled all the common law cases in which it is held that wages are dependent exclusively on the earning of freight, and professedly taking his stand on the general maritime law, and invoking, as authorities to sustain the principle, the marine law as held in France, in Spain in the height of her maritime greatness, of Holland in the period of her greatest commercial prosperity, of Denmark and of this country, he ordered wages to be paid from the savings of a wreck, though no freight had been earned; thus at a single stroke completely revolutionizing all common law ideas on this subject, and overturning, or at least very essentially qualifying a maxim that had stood unquestioned by the common law courts for ages. Holt, Law of Shipping, 278.(*a*)

(*a*) 'The marine law of the United States,' says Chancellor Kent, 'is the same as the marine law of Europe. It is not the law of a particular country, but the general law of nations; and Lord Mansfield applied to its universal adoption the expressive language of Cicero when speaking of the eternal laws of justice: *Nec erit alia lex Romæ alia Athenis; alia nunc alia posthac;*

When we can trace up a principle to the very *incunabula* of the science, and find one uniform and concurring voice among the most respected writers of different ages and nations, and find this principle expressly and strongly asserted by one of the ablest of our own maritime judges as the existing law of this country, it would certainly seem to be safe to rest on such authority, though no adjudicated case can be found directly in point.

Such appears to me to be the authority for the principle that freight is pledged for wages, a principle which also comes so strongly recommended by the most obvious reasons of natural equity. But it is argued that, admitting the rule of the marine law to be as contended, the right of the seamen to proceed against the freight for their wages is taken away by the operation of the statute of the United States for the government and regulation of seamen in the merchant service. U. S. L. vol. 2, ch. 56, s. 6. I do not so understand the statute. It authorizes the seamen, under certain regulations, to obtain process against the vessel for the security of their wages. This merely affirms and regulates a remedy which they had before, and it would be going a great way to hold

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sed et omnes gentes, et omni tempore una lex et sempiterna, et immortalis continebit.

'When Lord Mansfield mentioned the law of merchants as being a branch of public law, it was because that law did not rest essentially for its character and authority on the positive institutions and local customs of a particular country, but consisted of certain principles and usages which general convenience and a common sense of justice had established, to regulate the dealings among merchants and mariners in all the commercial countries of the civilized world.' 2 Kent's Commentaries, 509, 510.

Mr. Brougham, in his late speech on the *state of the law*, while he threatens to reform the whole municipal law of the kingdom with an unsparing hand and to strike out what he considers abuses both in its principles and practice with a boldness which, I think, must strike with dismay those who have been bred up in habits of veneration for black letter lore, and those who have been smitten with affection for the subtleties of special pleading, or are charmed with the mysteries of conveyancing, proposes to leave the commercial law as it is, and the reasons he gives for it are worth noticing. I quote them from a copy of his speech corrected and published by himself.

'I intend also to leave out of my plan the commercial law. It lies within a narrow compass, and it is far purer and freer from defects than any other part of the system. This arises from its later origin. It has grown up within two centuries, or little more, and been framed by degrees, as the exigencies of mercantile affairs required. *It is accepted too, in many of its main branches, by other states, forming a code common to all trading nations, and which cannot be easily changed without their consent.* Accordingly, the provisions of the French civil code unsparing as they were of the old municipal law, excepted the law merchant, generally speaking, from the changes which they introduced.'

that this deprived them by implication of another concurrent remedy.

The freight is the proper, it is the peculiar and appropriate fund out of which wages are to be paid, and the personal responsibility of the master is founded not so much on the contract, as on the fact that he is entitled to receive the freight for those to whom of right it belongs. If the seamen have not usually resorted to this fund, it is because the law supplies an easier and simpler remedy. But when a party has several remedies, it lies with him to elect that which he judges most advantageous for himself. On the whole, after the most deliberate examination I have been able to give the subject, I am brought to the conclusion that the seamen have a lien on the freight for their wages, which may be enforced by a libel in the admiralty. This applies to so much of the freight as is due on that part of the cargo which was shipped and consigned to Mr. Thayer.

With respect to the rest of the cargo it is contended that no freight is due except what is secured by the charter-party. By the terms of that instrument the charterers were to victual and man the ship and to pay all charges. It is argued that being owners for the voyage, they are their own carriers, and no freight is due. If this be correct, as the charterers are insolvent and have assigned their whole property, including this cargo, the effect will be that the owners of the vessel will not only lose the whole charter of the ship, but will, through the liability of the vessel, indirectly have thrown upon them the additional burthen of the seamen's wages. To my mind it appears that this part of the case turns simply on the question whether the lien of the seamen extends to the merchandise, or is confined to the hire for transportation stipulated between the ship owners and the owners of the cargo. If the seamen can enforce their claim against the goods taken on freight, I see no reason in principle why they may not against the goods of the owner or charterer of the ship. The nature of their service is the same, and if it gives them a *jus in re*, if it creates a lien which adheres to the thing, it adheres to it, whoever may be the owner. Their own labor has been incorporated into the value of the merchandise in one case as it has in the other. The authorities go directly and fully to the point; the merchandise is declared to be hypothecated for wages as well as the freight, that is, as I understand the law, hypothecated to

the wages to the amount of freight due upon it, and the merchant is not entitled to receive his goods until the lien is discharged.

And this leads to an answer to another difficulty which was stated at the argument. The property has been attached by sundry creditors of the charterers, and the cases are now pending in the state courts. It is argued that as different creditors are each pursuing their own rights against this property in different courts, it is a proper rule to prevent collision of judicial authority to give precedence to those who first lay their hands on the fund. This priority might be decisive if both creditors stood in the same relation to this specific property. But the reason no longer holds when the claim of one of the parties is in its nature a privileged claim. The very essence of a privilege is to give to the creditor a preference over the general creditors of the debtor; and if such be the claim of the seamen, the attachment only created a lien on the property subject to such prior incumbrance. It can only extend to the whole right of the owner, and that was to hold the property after discharging the lien.

Another argument is that a *bona fide* alienation defeats a tacit hypothecation, and the purchaser takes the property discharged of the lien. Brown's Civil and Admiralty Law, 2 vol. 143, is relied upon as sustaining the principle. He says, it is true, that by the civil law things tacitly pledged might be freely alienated before they were arrested. The general rule of the civil law is certainly the reverse; the purchaser takes them *cum onere*. Brown refers, as authority for this dictum, to the Digest L. 20—2—9, and to Ayliffe's Civil Law. I have not seen Ayliffe, but the law cited in the Digest does not sustain the principle in the terms in which it is stated. The law is confined to a single case, the hypothecation which the landlord has in the movables of his tenant for rent, and merely gives to the tenant the power to manumit his slaves notwithstanding this tacit hypothecation, which he could not do if it was express. But when money is loaned for the repair of a house and the house is sold, it passes *cum onere* and the hypothecation follows it into the hands of the purchaser; and such would be a case analogous to the present.

Another objection urged is the general inconvenience of admitting the principle that the cargo is liable to this process. The inconvenience is I think greatly overstated; and in cases

like the present it is far from inconvenient, for it enables the seamen to extract their wages from that specific property which actually owes the debt. But in any case, when goods are attached for security, they can readily be discharged by the owners' entering into a stipulation. It is the uniform practice of the admiralty to order goods which are so attached to be restored to the claimant on his filing a caution with sureties according to the form used by the court. Were it not for this practice the argument *ab inconvenienti* would be quite as strong against holding the vessel liable.

Upon the whole, my opinion is, that the freight, or that part of the cargo consigned to Mr. Thayer, is bound to the seamen for the payment of their wages to the amount stipulated in the bills of lading; and that they have a lien on that part of the cargo shipped and owned by the charterers for a charge in the nature of freight which overreaches the title gained by the assignees under the assignment, and that of the attaching creditors under the attachment. To the amount of a reasonable freight, at least, it appears to me that the seamen stand in the character of privileged creditors of this property, and are entitled to have their claim first satisfied.

Art. V.—CONSTRUCTION OF A POWER OF ATTORNEY, AND OF A DEED.

Opinion of David Hoffman, *Esq. of Baltimore, on a case depending in Georgia.*

John Doe ex dem. Murrill Collier, } *Ejectment in the Supreme Court of Gwinnett County, Georgia.*

v.

Richard Roe, Reddin Bloeker, and Benjamin Ivy, } *Tenants in Possession.*

CASE.

The *plaintiff*, to sustain the issue on his part in this cause, produced, 1st, The state's original grant to John Mullins, dated October, 1820, for lot No. 176, now in dispute, and which was drawn by said John Mullins in the Land Lottery of the state of Georgia: 2d. A deed of conveyance from the said John Mullins to Murrill Collier, the plaintiff, dated November 16, 1820, which is hereunto annexed, marked No. 2, for the

consideration of $500. And having established the *locus in quo*, he rested his cause on the said two deeds.

The *defendant* relied, 1st, On a power of attorney, or document executed by the same John Mullins, dated June 3, 1820, to E. Young and W. Blake, which is hereunto annexed, marked No. 1. 2d. On a deed of conveyance from the said E. Young and W. Blake, dated November 14, 1820, professing to act under and in virtue of said power of attorney or document, and to convey the said lot for $1000, to P. Blake and Jacob Buffington, under whom the defendant claims title. The said deed is also hereunto annexed, marked No. 3.(*a*)

The *plaintiff* contends, *First*, That the power of attorney, or document No. 1, gave no authority to *convey*. *Secondly*, That if it be a sufficient power for that purpose, the deed No. 3, which professes to be made under its auspices, was not legally made, and conveyed no interest or estate, as it was not in pursuance of the authority to *convey*, if given, since the conveyance is not in the *name of the principal*.

It is also stated to me that no *decision* has taken place in the state of Georgia, which can rescue any part of this case from the control of common law principles, and established English cases prior to the revolution; and further, that there is no *statute* of that state which can affect the case, if the following statute, enacted in 1785, be, as it is presumed to be, wholly inapplicable for that purpose. The statute provides 'That all sales, or conveyances of land, which shall be hereafter made, by virtue of any letters or powers of attorney, duly executed, which do, or shall *expressly* give power *to sell* all lands, &c. shall be good and effectual in law, as if made by the constituents.' Prince, 113.

Upon the foregoing statement of facts, my opinion is requested whether the plaintiff or defendant has the better title.

OPINION.

After a careful examination of the papers, and most, if not all, of the material British and American cases applicable to the points involved in the case, I am of opinion the law is decidedly with the *plaintiff*.

In assigning my reasons for this opinion, I shall endeavor studiously to regard all that may be fairly urged on behalf of

(*a*) These documents are now omitted, their substance being sufficiently set forth in the course of the argument.

the defendant, and shall examine the legal operation of the several instruments, in that order which may be necessary to arrive at a clear statement of the principles, and decisions relied on.

1st. As to the effect and legal operation of the power executed by John Mullins to E. Young and W. Blake, marked No. 1. This instrument must, we presume, operate in one or the other of the *four* following ways:

First. As a power of attorney authorizing Young and Blake to *convey* to any purchaser a good and sufficient title to any lot or lots which should be drawn by Mullins in the then ensuing Land Lottery.

Secondly, As a mere *covenant,* under a penalty, by Mullins to Young and Blake to convey such lot or lots, to any one who should agree with Young and Blake to become the purchasers.

Thirdly, As a covenant, coupled with a power in Young and Blake to carry the same into effect.

Fourthly, As a GRANT to Young and Blake of any lot or lots which *might* be drawn, and a covenant to confirm the title to any purchaser under Young and Blake.

A few remarks on each of the foregoing views of this very *inartificially* worded instrument will, perhaps, be sufficient to show how inoperative it is in law, under *either* view, to be the source of *title* in the defendants.

FIRST. If we attend to the *language* of the instrument, there will be found no words which import a power in Young and Blake to *convey* lots, when drawn by Mullins, but just the reverse. It states that Mullins is held and firmly bound, under a penalty, to Young and Blake, to make a good and sufficient title to any lot he may draw. The *title* and the *conveyance* are to be made by *Mullins.* Whether the conveyance, when made, is to be to Young and Blake themselves, or to such persons as should agree with them to become the purchasers, *non constat,* nor is it now material to inquire. The instrument then proceeds to constitute Young and Blake his attorneys, for him, and in his name to do, and act as they see proper, according to law, in and about the said land. Thus far the instrument is far from being a source of title from Young and Blake to the defendants; for not a word is said of the attorney's power to *convey.* The instrument, however, proceeds—'Hereby ratifying and confirming all that my said attorneys may lawfully do in and about said land, any instru-

ment of writing given by my said attorneys, shall be as binding on me, as if I were personally present.'

These words do not import, in my opinion, a power in the *attorneys* to *convey* the good and sufficient title, for *that* was to be done by Mullins. I apprehend that nothing more was intended than that the agents should seek for purchasers, agree upon terms, &c. and that any instrument defining these terms, should be ratified. But if these words do import an authority to *convey*, it either professes to ratify what is *lawfully* done (which, if thus done, would then have vested a valid title in the defendant) or, it offers to ratify *any* instrument, however unknown to the common law, or to the statutes of Georgia, and particularly the abovementioned statute of 1785; which ratification, I presume, would be wholly inoperative, and could not prove a legitimate source of legal title; for, if the common law requires a particular mode of executing a conveyance, neither the *covenant* of Mullins, nor his *ratification* would render the title of the defendant valid, if it reposes on a deed which has been made in disregard of that requisition. And so also of all *statutory* requisitions. The act of 1766 of Maryland, for example, requires a deed to be acknowledged and recorded, in order to be valid even as between the *grantor* and *grantee*. Now, if a power of attorney should authorize and covenant that *any* deed, however informally made by the attorney, should be equally valid with a deed made in compliance with all the requisitions of law; and the deed is either not acknowledged, or not recorded, it could not be read in evidence as a source of title; and the *power*, the *covenant*, and the *ratification* would neither help it, nor *estop* the original owner from treating the deed as a nullity. We shall presently assign our reasons for believing the deed, 14th November, 1820, from Young and Blake, to be wholly inoperative as a conveyance on common law principles; and the statute 1785, so far from legalizing the conveyance, appears to me to have a contrary effect. All that this statute contemplated was, (for the removal of doubts) to enact that deeds made in virtue of *powers of attorney* should be valid to pass the estate. But it never intended to introduce as lawful any *new mode* of executing such deeds. Two things, therefore, are still requisite to such deeds since this statute, viz. *first*, that the power of attorney should itself *expressly* confer a power of *sale* to the attorney; and *secondly*, that the conveyance when made, should be executed according to the

requisitions of law. The power of attorney, now under consideration, does not give even impliedly, a power to the attorneys to *convey;* and even were there an express power, we shall presently state our reasons for believing that the deed which professes to be made in virtue of it, has not been properly executed. On this *first view*, in relation to this instrument, I have no hesitation in stating that it does not confer on Young and Blake a power to *convey* the lot, either in their own name, or even in the name of Mullins, their principal.

Secondly. If this instrument be a mere *covenant* by Mullins with Young and Blake, to convey a good title to any lot or lots when drawn (as I think it is) still it is subject to various difficulties; and even if clear of the doubts alluded to, it cannot, as a covenant, be the vehicle of title to the defendants in this cause. Whether we regard the *res subjecta* of this covenant as a mere naked possibility, or as a possibility coupled with an interest, or as a chose in action; or in whatever other light we may consider it, still it is but a *covenant*, and can operate only *in personam*, and be creative, as such, of a *personal charge* only against the *covenanter*. Various questions may be here presented, which I shall but briefly examine; for, whatever may be the sound law as to each and all of them, we consider the plaintiffs' title at law as free from all doubt, on distinct grounds, which will be hereafter examined. The questions to which we allude are briefly these:

1. What was the precise nature of John Mullins's right, prior to the drawing of the lottery. Was it a naked possibility, or a possibility coupled with an interest?

2. Was the right *assignable* at law, and if not, what would be the relief of the covenantees, and the purchasers under them, in equity?

3. If it was a naked possibility, not assignable at law, would a *covenant*, charging such a right, be in any manner regarded by a court of law?

4. Are possibilities, when coupled with an interest, assignable at law; and if not, would a covenant to assign them be enforced at law by the recovery of damages for not conveying, after the possibility has matured into a vested interest?

In the course of the ensuing opinion I shall have occasion to advert to the foregoing questions.

Thirdly. Is this instrument a covenant, coupled with a power in Young and Blake to carry the same into effect? We

think clearly not; for it could not be carried into effect by them unless they had the power to *convey*. The covenant then could only operate as between the parties. It would remain an executory contract for ever, except through the act, voluntary, or compulsory, of *Mullins*. What has already been said on the *first* and *second* views in regard to this instrument, may also be applied to this *third*.

If the right to the lot in question was, at the time the covenant was made, a possibility, assignable in *equity* only, it could be *chargeable* only in equity, after the right became an ascertained and vested interest. It has been supposed by some enlightened lawyers, that a covenant of this kind is an absolute nullity at law, and that as the right is not assignable at law, no damages can be recovered for breach of a covenant to convey a possibility, or to assure the title after the possibility ripens into a vested interest. It is supposed that as the *assignment* of a possibility, which is an executed contract, is good only in equity, law will not lend its aid to enforce a covenant to convey, which being executory, can no more be regarded by law than the executed contract would be; and that there is no other remedy but in equity, and by bill for specific performance. There are authorities which countenance this doctrine, and if this idea be pursued out in principle, the consequence would be that law would wholly refuse to respect any covenant to assign possibilities of either kind, choses in action, and various other things which strictly are not assignable at common law. Ingenuity, no doubt, could produce arguments on both sides of this nice question; but as it is not necessarily before me, I need not discuss it. I admit that a man cannot *grant*, or *charge* at law, what he hath not. Hence, if one grant a *rent charge* out of the Manor of Dale, and *afterwards* purchases the Manor of Dale, he shall hold it discharged of the rent. Perk. § 65. 3 Bac. Abr. 382. Hob. 132. But does it not savor of a *non sequitur* to conclude that a covenant is inoperative when the covenantor had no actual, or even potential right in the *res* covenanted for? On the foregoing principle, it may be, and has been argued, that although a man may bind himself by a covenant to *purchase* a certain estate, and convey the same to the covenantee, yet that if he covenants to convey to A any estate which B shall devise to him, or any estate which he shall inherit from B, it is a void covenant at law. On the same ground it might be urged that if

one of two joint tenants covenant to assign his *jus accrescendi*, or, that if *he* be the survivor, he will convey the entire estate, and land to the covenantee, or, if one of two tenants in common for life, remainder to the survivor in fee, should covenant that if *he* be the survivor he will convey the whole in fee to the covenantee, I say it may, and has been contended by some, that *such* covenants are wholly inoperative at law, no damages being recoverable, because the actual assignment of such possibilities are respected only in equity. On this idea was it that, in the case of Jones *v.* Roe, 3 T. R. 88, Lord Kenyon puts the case of an heir apparent who makes a deed for the conveyance of his right or chance of inheritance. He says that such a disposition is wholly void, although the estate *do* devolve upon him on the death of his ancestor; not on the ground that such a sale is against public *policy*, but simply because it is a *bare possibility*, which is not assignable. And the learned annotator on Fonblanque on Equity, vol. 1 p. 216, remarks upon this case, that 'it may hence be inferred that damages could not be recovered at law for the non-performance of a contract or covenant to convey such an estate, though, if it be for a valuable consideration, it would be decreed in equity.' vide also Hobson *v.* Trevor, 2 P. Wms. 191; Beckley *v.* Newland 2 P. Wms. 182.

Without inquiring further into these nice distinctions; and whatever may be the operation of a covenant to convey possibilties, of either kind, or choses in action; and whether an assignment of them can be regarded at law, or in equity only, I would briefly remark that it appears to me to be far from a *clear* position that because such things are assignable only in equity, therefore a court of law would decline to notice a covenant for their conveyance, especially if the covenant be to convey the interest when it shall arise, or become vested out of what was but a possibility, or a chose in action at the time the covenant was made. Whatever, therefore, may be the operation of John Mullins's covenant with Young and Blake, it is very certain it cannot affect the plaintiffs' right to recover the land in controversy.

FOURTHLY. Does this instrument operate as a GRANT of the land to Young and Blake? Can it convey to them any lots which Mullins might draw in the Land Lottery, with a covenant to *confirm* the title to Young and Blake, or their assignees? This question involves the consideration of Mullins's

right, prior to the drawing of the lottery, and whether it was assignable at law, or in equity. The inquiry will lead us to some antiquated learning. That this is not a grant is to be inferred, both from the absence of intention to grant any thing to Young and Blake, and also from the incompetency to convey the subject matter, before the drawing the lottery ascertained the thing to be granted, or whether there would be any thing on which the grant could operate.

The instrument professes to convey nothing *in præsenti*. It does not aim at conveying a present right to a future thing. It merely stipulates, under a penalty of five thousand dollars, that *Mullins* shall convey at a future period whatever lots may be drawn by him in the lottery; and it appoints Young and Blake his attorneys; thereby excluding all idea of a grant to them; for we have seen that they could not convey to themselves, or to others, after the right became vested; and the right, or chance itself was not designed to be conveyed for any time, whereas the estate, or interest which might arise out of the right, viz. by drawing a lot, was an estate in fee. No intention, therefore, appears to have existed to *grant* this right or chance, whatsoever was its assignable nature when the instrument was made. The whole then seems to rest in covenant only.

But suppose there was a manifest intention, an express grant, or assignment; could this be legally effected? The right was clearly a possibility, and whether it is to be classed under the head of naked possibilities, or those coupled with an interest, is immaterial, provided all possibilities are assignable in equity only. It becomes necessary, therefore, to examine what kind of possibility it was; and if a possibility coupled with an interest, whether it can be assigned at law, and still further, if it can, then whether the mere assignment of the possibility vests the full estate in the lands in such assignee, without any further act on the part of the assignor, after the lots are drawn; or must the possibility be necessarily clothed with the full legal title, by the mere happening of the contingency?

The nature of possibilities, and the criterions which distinguish the one class from the other, are very unsatisfactorily set forth in the books. But, from such lights as we have, I am disposed to think that this was a mere naked possibility; and that if the instrument be a grant, it was clearly inoperative at law. A mere *right*, a mere *possibility*, a possibility coupled

with an interest, a right of *entry*, a *title* of entry, a *right of action*, an *interesse termini*, a *condition*, a *contingent interest*, are all distinguishable from each other; and the distinctions, though often subtile, sometimes lead to very important legal consequences. Thus, for example, there can be no seizin of a right; it can neither be assigned, nor devised; there can be of it neither dower, nor curtesy, nor a *possessio fatris*. Watkins on Des. 44, 47, 48, 51, 52, 82, 109. Neither can a title of entry, or a right of entry be assigned, and, perhaps, not even devised. Goodright *v.* Forrester, 1 Taunton, 578. Nor is there dower or curtesy of such a title, or right, though they be transmissible by descent, and may be released. 10 Coke, 48. So a condition can neither be granted nor devised. Hence a mortgager, before condition broken, can neither alienate nor devise. He may grant or devise his equity of redemption, but he must have it before he can do either; and an equity of redemption only arises after condition broken; before condition broken, it is a pure condition, and not a possibility coupled with an interest, which is devisable at law, though not assignable, and is assignable in equity, (though some say at law also.) Vide 1 Powell on Mortgages, Coventry's edition 268, Note N; 2 Preston's Abstracts of Title, 186. So likewise an *interesse termini* is assignable at law, and is said to be the only instance of this species of right which is thus alienable. 1 Preston on Estates, 63, 88, 89.

As to possibilities, they have generally been divided into two kinds, viz. naked, and coupled with an interest. And though there are many instances given in the books, illustrative of each species, there has never been any very comprehensible rule or criterion pointed out, by which they may be clearly and certainly distinguished from each other. Mr. Coventry finds fault with the phrase 'possibility coupled with an interest,' and says 'the phrase, though a common expression, is yet exceptionable, and not, strictly speaking, correct; for if the possibility be accompanied with an interest, it ceases to be a possibility, and is a contingent interest.' Vide Coventry's Powell on Mortgages, 270. He therefore thinks that these two species of right should be called possibility, and contingent interest, the first being what is usually called a naked possibility, (such as an heir's hope or expectation of inheritance—a joint tenant's *jus accrescendi*—such contingent remainders and executory devises as do not ascertain the person,

as for example an estate to A for life, remainder to the right heirs of B, or a devise or use to the heirs of B, or an estate to A and B for life, remainder in fee to the survivor) and the second, called by Mr. Coventry 'contingent interests,' and by others 'possibilities coupled with an interest,' are exemplified by such contingent remainders, executory devises, shifting and springing uses, as do ascertain the person, be the contingency what it may.

In regard to the assignable quality of possibilities, or similar rights, by whatever name they may be called, a diversity of opinion appears to exist. Some writers seem to think that possibilities of neither class are assignable at law; others say that all are assignable in equity. Again, some contend that naked possibilities are not assignable even in equity, whilst others say that those coupled with an interest are assignable equally at law and in equity, whilst naked possibilities are assignable in equity only.

It is said that all contingent interests, being executory, cannot be assigned at law, because those who claim the rights have no estates. 10 Coke, 50 a. Co. Litt. 264, 6, 265 a, note 212; 1 Ves. 390, 409; 3 Ves. 391; 7 T. R. 589.

Under the idea that whatever is contingent is a possibility, and therefore not assignable, or devisable, it was, at one time, questioned whether a contingent remainder, or an executory devise could, in any case, be assigned, or devised; but when the courts took the distinction between a naked possibility and one coupled with an interest, a contrary doctrine was established, and the latter are now both assignable and devisable.

A right of survivorship and an heir's hope of inheriting are classed with mere naked possibilities; they are mere expectancies, or chances, and are neither assignable, nor devisable. But an executory devise, or a contingent remainder, if the person be ascertained, may be said to be more than a mere chance, expectancy, or possibility; it is a present right, which may, or may not vest an estate or interest in the person; and is, as all admit, assignable in equity, and, some say at law also, and is clearly devisable. They may likewise be released; are transmissible by descent; pass by bargain and sale to the commissioners under the statutes of bankruptcy; may be bound or extinguished by estoppel, (and hence, in this way, sometimes virtually conveyed at law). And though they are

not assignable by the ordinary rules of the common law, are, nevertheless, bound in equity by covenant or contract.

On the other hand mere possibilities, as an estate to the survivor of several persons, to issue who shall attain a certain age, to children, if living at their parents' death &c. &c. are not devisable at all; nor do they pass to bankrupt commissioners: nor are they assignable at law; but they may be bound by estoppel at law; and after the contingency has accrued, equity will decree a specific execution. As to the assignment, devise, &c. of possibilities, vide 1 Maddock's Chan. 549, Butler's ed.; Fearne on Ex. Devises, 548; Vin. Abr. Grant N.; Shep. Touchstone, 239; 1 Preston on Estates, 75, 76; 1 Chan. Rep. 29; 1 Chan. Cases, 8; 2 Preston's Abstracts of Title, 92, 202; Anstr. Rep. 11; Cro. Car. 477; 4 Coke, 66; Goodright *v.* Forrester, 1 Taunton's Rep. 578, 602, 604, Beames's Elem. of Pleas in Equity, 118; Helps & wife *v.* Hereford, 2 Barn. & Alder. 242; Carlton *v.* Leighton, 3 Meriv. Rep. 662. In equity, perhaps, every species of possibility or contingency, may be bound by contract, 1 Ves. 409; 2 P. Wms. 132, 191; 2 Atk. 420; 6 Ves. 261; 3 T. R. 88; 1 Cov. Pow. on Dev. 18, note A, sed vide Carlton *v.* Leighton, 3 Mer. Rep. 662.

The language of the books speaks, almost universally, as if possibilities, even coupled with an interest, were assignable in equity only. 1 Mad. Chan. 549. And Cruise says that executory devises, and contingent remainders, though limited to ascertained persons, are assignable only in equity. 2 Cru. Dig. 298, Remainder, Title xvi. § 15, 20, 21, 22, 23.

Some have been inclined to think that all possibilities coupled with an interest are not only devisable, but assignable at law; and they desire to extend the doctrine to mere choses in action. If such devises be good at law, and the like assignments be void at law, it arises from the technical nature of a grant at common law, and the peculiar nature of a devise. On the whole, I am inclined to believe that possibilities of every kind, as well as choses in action, are transferable *inter vivos* only in equity, except when the transfer is an estoppel, operating virtually as a conveyance at law, as was the case in Weale *v.* Lower, Pollex. 54, which was a fine levied by one, to whom a contingent remainder had been limited. It was held that though the fine operated at first by conclusion, and passed no interest; yet, upon the happening of the contingency,

the estate by *estoppel* became an estate in interest, of the same effect as if the contingency had happened before the fine was levied; and that the conusor and his heirs after him, were bound by the fine. So likewise in Helps *v.* Hereford, 2 Barn. & Alder. 242, A and his wife had granted to trustees an estate of which the wife's father was seized at the time of the grant; and in the life time of the father they also levied a fine of the lands to the use of the settlement. On the death of the father, a moiety of the lands descended on the wife. The court were of opinion that the fine operated as an estoppel against the husband and wife, and all claiming under them, as to this moiety. Vide also Wright *v.* Wright, 1 Ves. 409; Vick *v.* Edwards, 3 P. Wms. 372; Edwards *v.* Rogers, Sir Wm. Jones's Rep. 456; Co. Litt. 352, a; Shep. Touchstone, 6. But all of these are cases of fine or recovery; and, perhaps, no case can be found of a deed thus operating by estoppel, virtually to convey at law such possibilities. A contrary doctrine was expressly held in Whitfield *v.* Fausset, 1 Ves. 387, where the distinction between a fine and a deed is taken and admitted, and the deed was held to be wholly inoperative to convey by estoppel the possibility attempted to be conveyed. So also in the case of Taylor *v.* Phillips, 1 Ves. 229, a copyholder surrendered his possibility, and the court held that it did not pass by estoppel. Vide also Goodtitle *v.* Morse, 3 T. R. 365, &c.

But even admitting, *argumenti gratia*, a deed of grant to be as operative by way of estoppel, as a fine or a recovery, the instrument, signed by Mullins, in the case under consideration, is not a deed of conveyance; and being a covenant only, could not operate, even in equity, as a conveyance by estoppel.

I shall finish my remarks on this fourth and last view of the instrument, viz. as a grant of John Mullins's possibility, by a brief inquiry, whether this be a naked possibility, or one coupled with an interest; and if naked, whether the title can be complete in the assignee, on the happening of the event (viz. the drawing of the lots) without any further act or conveyance of Mullins.

That this is not a possibility coupled with an interest appears to be strongly manifested by the examples I have stated of each species of possibility. Even in the case of contingent remainders, executory devises, conditional limitations, springing and shifting uses, we have seen that it is essential that the

person be ascertained, otherwise they are classed under the head of mere naked possibilities, and are not even devisable. These remainders, &c. are clearly distinguishable from mere chances, hopes, expectancies, and such like, for they import an actual continuance of the same seizin, and though the interest or estate be not vested, but remains contingent till the occurrence of the event, there is still a recognised difference between such a right and a mere naked chance. If the *jus accrescendi*, or mere right of survivorship in case of joint tenants, is properly classed under the head of naked possibilities, and hence are not even devisable, I can see no distinction between such a right and the chance of drawing a prize in a lottery. In the case of a right of survivorship the chance is that he may survive or may die. So in a lottery, the chance is he may gain a prize or meet with a blank. But, it may be said that the holder of a lottery ticket has paid value for it, and has an interest in the ticket, and also in the entire fund out of which the prizes may be drawn. To this I reply that the joint tenant also paid his money and obtained a deed, as well for his present interest as his possibility, or *jus accrescendi;* and further, that if the grant of Mullins's possibility does transfer the ticket, (which is questionable) still the right which is granted is nothing more than the possibility, though it be evidenced by the ticket. The ticket is one thing, the right granted is another; as a law is, in strictness, the mandate of the legislator, whilst the statute, or act of assembly, is the written evidence of that mandate. The one is an *ens rationis*, is invisible and incorporeal; the other is tangible and corporeal; and the grant of the right does not necessarily transfer the corporeal evidence of that right. But admitting that it did transfer the ticket, at law as well as in equity, still a possibility only passes; for the ticket is but an evidence or muniment of title to a possibility. It is also a *petitio principii*, to say that the assignor of the ticket and possibility had any fixed or legally comprehensible interest in the fund out of which the prizes were to come; this is not the idea of a lottery; he owned nothing but the chance of obtaining a prize, and if he could grant, or has granted any thing, it was the chance only, and not any interest in the joint fund. This chance then, being, as I think it is, a mere naked possibility, was not capable of being legally assigned to Young and Blake.

Lastly. If I be right in considering it a naked possibility,

and the instrument be a grant, (which is denied) still the occurrence of the contingency (viz. the drawing a lot) would not, I think, *per se*, vest the full legal title in Young and Blake. It would require some further act of Mullins, or a court of equity to establish the grantee in his title, and as neither Mullins nor a court of equity have done any such act, it appears to me that the defendants have no title, even admitting, for the sake of argument, that there has been a grant, and that a grant of a possibility is good at law as well as in equity.

On the whole view of this instrument, therefore, I am of opinion,—

1. That Young and Blake had no power to convey the lots, when drawn:

2. That it is a mere covenant by Mullins, which cannot aid the defendant in this suit, and, perhaps, not even in equity, against the claim of a *bona fide* purchaser under Mullins:

3. That there is no power, coupled with this covenant, which authorizes Young and Blake to execute in any way the covenant, and if there were, it has not been done:

4. That this is not a grant, and if it were, it is only a grant of a naked possibility, cognizable in equity only, where the conflicting claims of the plaintiff might be arrayed against those of the defendant; and where he who has the better right or equity, would prevail.

If what has been stated be correct, it would be sufficient to dispose of the entire case. But even if the whole of the preceding views be untenable, (except that which would make the instrument a grant of a possibility coupled with an interest, and valid at law, without any further act by Mullins, which, I presume, could not be contended) still there remains a very material inquiry, after we admit that Young and Blake were authorized to convey, as the agents or attorneys of Mullins.

We shall now proceed, secondly, to the examination of the validity of the *deed* under which the defendants claim title.

II. If we should admit that the instrument I have just commented on, be a power of attorney authorizing Young and Blake to convey; the next inquiry is, *have they legally and duly executed that power; have they so made the deed that the law can recognise it as a conveyance from Mullins, through the agency of his attorneys?*

This question, as I understand, has been the main one on

which the case has turned. I shall, therefore, be excused if I enter into it very fully, and deduce the principles and authorities regularly from the earliest times, to the present day. The point then is, does a deed, executed by an attorney having power to convey, bind the principal, if it be not executed in the name of the principal? And what is the true import and meaning of the expression 'in the name of the principal?' I am of opinion that established principles of law, fortified by an uninterrupted current of British and American authorities, from the Year Books to our own times, has clearly settled the point against the validity of the deed in question. But as the question has sometimes been a little misunderstood, and distinctions have been attempted to be made which do not legally exist, I shall, in a preliminary way, lay down some positions which will be found to cover nearly the whole ground of the question, in whatever light it may be viewed. I shall then conclude with an examination of the leading cases which have occurred upon the point. The positions and distinctions to which I allude are,

First. That such an authority ought to be strictly pursued. It was special in its nature, and it was the duty of the attorneys to execute it, not only strictly according to the general requisitions of law, but in conformity to the terms of the power itself. Even incidental circumstances, prescribed in the creation of the agency, must be strictly pursued. Vide 1 Liver. on Agents, 96, 106, 107, 115; Simpson *v.* Hornesley, Prec. in Chan. 452.

Secondly. Mullins's power expressly requires that all acts done by his attorneys shall be done for him and in his name.

Thirdly. The books clearly show that the invalidity of a deed, executed as this was, does not at all depend upon the want of sufficient evidence in the deed that the agent is not acting for himself; for that fact is manifested in nearly every case in which the question has arisen, and yet the deed has been held void.

Fourthly. The true inquiry is, has the agent done the act strictly and technically in the name of his principal? Has he signed the name of the principal? Has he appropriated the seal as of the principal? If these things have not been done, it is in vain to urge that the entire deed discloses the fact of agency, and that the act is done in that character; for if these facts be ever so manifest from the deed, but it be not executed

in the name of the principal, it is not sufficient. On the other hand, if the agent appears in the body of the deed to act for himself, but executes it in the name of his principal, it will be valid.

Fifthly. As a power of attorney, *in se*, vests no interest or estate in the agent, none can pass from him, nor can any pass through him, unless in the name of the principal, who hath the estate. Hence the courts have distinguished between agencies relating to mere acts, and those which authorize the passing of an interest. In both cases, however, the act ought to be in the name of the principal, but, in the former case, it requires less to make it the act of the principal, than in the latter. Where a mere act is to be done, it may be stated to be done for and in behalf of the principal; but where an interest is to be conveyed, the name of the principal must be signed by the agent, and the seal must be appropriated by the agent for him. It was on this very distinction that Combes's celebrated case turned. 9 Coke, 77.

Sixthly. The principles of law must be respected, even though hardship and inconvenience do sometimes flow from their application. Nor can this rule of law be dispensed with, even by the consent of the principal. The concluding words, therefore, of Mullins's power, viz. 'and any instrument of writing given by my attorneys, shall be as binding on me as if I were personally present,' are wholly inoperative to sustain any deed, illegally executed, independently of that clause. But this clause (as I have before stated) must be connected with the previous sentence of the instrument, viz. that which covenants to ratify 'all that his attorneys may lawfully do.' But even admitting that the last clause is not thus controlled, still, as I have said, it cannot legalize any instrument, however informal; nor can it give efficacy to a deed or validate that, as a due execution of a power, which law pronounces to be an undue execution. I may go still further in this doctrine. Suppose that Mullins had expressly stated that 'whereas by a rule of law an agent must execute a deed in the name of his principal, in order to convey the principal's property to a purchaser, he, John Mullins, authorized his said agents to make the deeds in their own names, hereby ratifying and confirming, as duly executed deeds of conveyance, any deed made by his said agents.' Such a deed, I apprehend, would not *per se* be valid to convey the land; *first*, because it would perhaps be in

disregard of the act of 1785, and *secondly*, it would certainly come in conflict with the principles of law, which no consent can dispense with. Even under this strong view of the case, the deed, under which the defendants claim, would be inoperative as a conveyance, and the matter would rest in covenant only; a *multo fortiori* the present power cannot have that effect, when it is obvious, from the whole instrument, that no such intention of dispensing with any rule of law is manifested by the instrument. The doctrine that explicit declarations of consent will not give efficacy to instruments beyond what is accorded to them by the rules of law, is perhaps too plain to have required any argument; it is exemplified by a great variety of cases and analogies. Hence is it that the rule in Shelly's case must operate where the premises exist on which it may operate, although there be the most explicit intention that the rule shall not operate. So also, if the legal operation of technical words in an instrument be to create a certain estate, they must so operate, though contrary to the clearest intention of the conveyance or even express words. This is often the case, although in deeds, as well as in writs, the general rule of law professes to regard intention.

Seventhly. Regrets have been expressed by some that the rule of law now under consideration should have been established or be continued. They regard it as too technical and too liable to be infringed, to be sound. It originated, however, in principle and good sense. It has become a rule of property, and, like some other doctrines of the law, may occasionally operate with severity. But who is competent to rescind a clear and established legal rule or doctrine? No other power, we presume, than the legislature. If courts can do so, where is the safety or certainty of the science? Judicial legislation might riot on the labors of past ages, and the very foundations of a science, which ought to be as fixed as the eternal mountains, until altered by the legislature for good causes, would be liable to continual change, and thus, perhaps, be productive of more hardship than any fixed or certain rule. In maintaining this position I am not so fast a friend to the doctrine of *stare decisis* as not to admit some latitude to judicial interpretation; but when the rule is fixed by long concurring adjudication, it is nothing less than legislation of a very dangerous kind, for courts to annul or qualify the rule, when it happens to prove inconvenient or even unphilosophical. It is the province of

the legislature to abolish it when it proves a general evil; and so far from the legislature of Georgia having expressed any dissatisfaction at the rule, by the act of 1785, it appears to have left the execution of such sales and conveyances, under powers of attorney, as it is at common law. We are not, however, disposed to regard the rule in question as too technical for practical purposes. There are very many other rules more difficult to be thought of or adhered to, and the courts have never considered it as an arbitrary doctrine, but have almost uniformly enforced it with alacrity in every case in which it has occurred.

Eighthly. But it has sometimes been objected that attorneys often execute in both ways, and that in some places they always sign their own names as attorneys for their constituent, and therefore that the deed ought to be permitted by the courts to operate, on the ground that *communis error facit jus.* In reply to this idea, I beg leave to state that errors merely acquiesced in, and never judicially litigated and decided, do not constitute the law of a particular case, under the auspices of this maxim. The practice under the Lords's act, for example, had been one way for more than thirty years; and yet in the case of Lench *v.* Pargiter, Doug. 68, (which was the first case in which that statute came under judicial notice) the practice was declared to be incorrect, and that the maxim *communis error facit jus* would not apply. So also, in nearly every state of the Union as well as in England, it is a general practice to regard an interest in a pew, or shares in a road or canal company, a rail road company, bridge company, and finally the stock of all companies deriving revenue mainly from the use of corporeal hereditaments as personal, and not as real estate, or incorporeal hereditaments, annexed to, and exercisable in the realty; and yet it has been decided, and correctly we think, that such estate is *real* and not personal. It has been held that the shares descend to the heir, and not to the executor; that a wife may be endowed of them, a husband have curtesy, and finally that they possess every attribute of real estate. In this instance we find that long practice does not make the law. Hence it has become, of late, quite usual to express in the charters of such companies that the stock shall be deemed personal estate; lest, without this statutory provision, it would descend as other real estate. Vide Buckeridge *v.* Ingram, 2 Ves. Jr. 652. Many other cases might, but

need not be cited. And likewise, as another example, we may cite Way *v.* Carey, 1 New York T. R. 191, it was held that, although a justice's court, ever since the revolution, had entertained jurisdiction of suits by and against executors and administrators, yet when the question was made, the Supreme Court had no hesitation in declaring that long practice had no effect, and that the justice's court had no such power. So, lastly, where the corporation of New York had been in the practice of creating penalties, and giving a moiety of them to the informer, when the validity of the practice was questioned, the court wholly rejected the maxim, *communis error facit jus*, and denied the right, although it had been exercised for forty years, and very many penalties had, during that period, been even judicially recovered. Vide 1 Caines Cases in Error, 54.

Admitting, then, that in Georgia, or elsewhere, the usual practice has been for agents or attorneys to execute the deeds in disregard of the rule we are considering, the deed in question can derive no support from an appeal to the maxim we have remarked on.

Ninthly. The books are full of cases referrible to two classes or heads, both of which involve the question of the necessity of executing the deed in the name of the principal. The first class includes all those which are strictly applicable to the deed in controversy, and the point whether the principal is bound by a deed made by an attorney in his own name, as attorney for the principal; and the second class embraces those cases in which the inquiry is, whether the agent has made himself personally responsible, by reason of his neglect to execute the deed in the name of his principal. We should take care not to confound these two classes of cases.

Tenthly. The rule has no exceptions that I am aware of. For though it does not apply to simple contracts made under a general authority, (though even in these cases the agency must appear) nor to the case of a sale made under a power given by will, the devisor being dead, the person authorized may sell in his own name; yet these are not so much exceptions to the rule, as cases in which the premises, on which the rule is based, do not exist. 9 Coke, 77 a; 1 Roll's Abr. 330, plac. 40.

The foregoing preliminary observations will considerably diminish our investigation of the cases which sustain the doctrine of the invalidity of Young and Blake's deed, (admitting

a right to convey) on account of its irregular execution under the power.

I now proceed to an examination of the cases. The earliest recorded case, which we need notice, is that reported by Moore, page 70, plac. 191, and which occurred 6 Elizabeth. I shall render the case into English. 'The king, by his patent, gave authority to his surveyor to make leases of certain lands for life, rendering the ancient rent. The surveyor made the indenture thus, "Hæc indentura facta inter *Dominum Regem*, ex una parte, et Jacobum Southard, ex altera parte, quod Rex Dominus dimisit," &c. in testimony of which the surveyor attached his own seal. And by the opinion of the judges the lease was held to be void; for how could a man give an interest by deed of grant, but so long as he well used his authority; for the servant cannot make leases from year to year, in his own name, but must do so in the name of his master. Thus the seneschal of a manor, of which there are many copyholders, cannot make the copies in his own name, but must say *Dominus* per senescum suum concessit. So also he should not have put his own seal to the lease, but the seal of the king, because it was not a lease from the king without his seal. And the words prove this, as he should say the *king* by A B hath attached his seal. There was a great case in Devonshire, where a bailiff having made such a lease by virtue of such a power, in his own name. It is the opinion of the court, therefore, that all such leases are void.'

The above is certainly a very rudely reported case, as most of the cases of those early times are. I admit that in this case the attorney or surveyor *sigillum suum apposuit* merely, and did not add to his seal and signature 'attorney for the king.' But this can make no difference, (as all subsequent cases abundantly prove) 1. Because the infirmity consisted in placing his *own* seal and signature, which could not have been cured by the addition of the words, 'attorney for the king.' 2. The deed itself said *Dominus Rex dimisit*, and yet this (though it showed the agency) did not make it the king's deed, through the ministry of his surveyor, because of the irregularity in not executing the deed in the name of the king.

I am fully aware that many attempts have been made to distinguish the case of a mere seal and signature by the agent, from those cases in which the agent has added to his name

the character in which he executed the deed. But I shall hereafter show that this circumstance has never been held sufficient to rescue the case from the control of the rule, because the rule does not rest on the want of evidence in the deed of the character of agency, but on the principle that this character must not only be manifested, but the deed must be executed in the name of the principal, in order to convey any thing, and this can only be done by signing the principal's name and appropriating a seal, which though not expressly stated to be that of the principal, is, in legal contemplation, his seal.

The next case, in order of time, is Combes's case, 9 Coke, 75, which is generally resorted to as the great and first depository of the rule under consideration. This case, however, has been objected to on two grounds, by those who contend for the validity of this mode of executing deeds by an attorney.

First, That Combes's case only presents the naked fact of an attorney doing the act in his own name only.

Secondly, That the court's remark in that case, relative to leases made by agents, was a mere *obiter dictum*, and consequently not authority.

To these two objections we reply,

1st. That it is not exactly true that the act was done in the name only of the agent or attorney. He made the surrender in his own name indeed, but showed the letter of attorney, under which he acted, and made the surrender in virtue and in pursuance of said authority, which (in the case of a surrender) the court held to be a sufficient pursuance of the authority, though the court added that, in the case of a lease, such a pursuance of the authority would not be valid, but the lease must be made in the name, and as the act of the principal.

2dly. But even admitting that the attorney had made the surrender wholly in his own name, the court's opinion, perhaps, would have been the same; for a surrender of a copyhold differs essentially in principle from a lease or a conveyance. Hence is it, that as the surrender in this case was held to be good, though made by the attorney in his own name, some have argued that a lease ought also to be valid on the same principle. It is this mistaken view which has so often occasioned this case to be cited as an authority on both sides of the question under examination. Those who desire to impugn or to qualify the rule, contend that there is no difference between

a surrender of a copyhold, and a lease or other conveyance, and that if such a surrender may be made by an attorney in his own name (as Combes's case held) then may a lease or grant be so made. But the conclusive reply to this plausible but superficial argument, is to be found only in the peculiar nature of a surrender of a copyhold estate. That a difference exists between such a surrender and a lease, we find in Combes's case itself; but the reason of that difference is to be sought in the difference which exists between the two acts. Combes's case has been approved of by all subsequent judicial authorities, as also by all elementary writers; but counsel *arguendo*, have endeavored to question it, or, if that could not be done, then to contend that if a surrender thus made be valid, there is no reason why a deed should not be. It must be borne in mind, however, that a deed or grant passes an estate or interest from the grantor to the grantee, and this equally, whether the grant be made directly by the grantor, or mediately through an agency; whereas the peculiar nature of a surrender of copyhold estate is that it is merely ministerial. It is an act, on the part of the copyholder, evincive of his consent to the transfer; and is a ceremony to obtain the lord's consent. And after all, in legal strictness, a surrender is not a conveyance by the copyholder. The surrender passes nothing. Even the surrender and admittance pass no estate; for a copyholder is still, as formerly, a mere tenant at will as to estate, and no tenant at will can convey; he has no estate to convey. The freehold is in the lord, not in the copyholder; the estate is in the lord, not in the tenant; and although the custom of the manor allowed some tenants at will, since called copyholders, to surrender, &c. it did not amplify their estate or interest; it gave them nothing more which they could convey, than they possessed when they were mere tenants at will. The custom of the manor merely conferred on them a new privilege. So that the true and technical nature of a surrender of a copyhold is the yielding up of a tenancy at will to the lord, in trust, in order that the lord may admit a new tenant, designated, it is true, by the surrenderor; but still no estate passes from the copyholder to the newly nominated tenant. This is perhaps something of a refinement, but the system of English jurisprudence, in common with, perhaps, every other, has these niceties; and the theory of them cannot be disregarded, as they so often tend to important practical results.

Vide Watkins on Conv. 1; 1 Cru. Dig. 295 § 5; 5 Cru. Dig. 533, § 1, 6.

From what we have stated as to the peculiar nature of a surrender of a copyhold, it is plain that the first resolution of the court in Combes's case cannot be relied on as authority to prove that an attorney may convey in his own name, because he may surrender a copyhold estate in his own name, the last being merely a ministerial act. Paley, in his essay on the Law of Agency, says that in all cases of agency, whether the act to be done relates to things ministerial, or to the passing of an interest, the act must still be done in the name of the principal; but that a distinction exists as to the form of doing these several acts. When the act is ministerial, as in the surrender of a copyhold, it will be sufficiently in the name of the principal if it appears to be done on his behalf; but when an interest is to be passed, it must be both formally and substantially in the name, and on the behalf of the principal. 'But though in these cases of mere ceremonial acts,' (says Mr. Paley,) 'it is indifferent in what order the names stand, whether the principal by the attorney, or the attorney for the principal, yet in the form of a contract made by an attorney, the wording is material. Where an interest passes by the instrument, as in an indenture of lease, it must in terms be conveyed by the principal, in whom alone the interest is; for the power of attorney, as such, vests no interest in the representative; consequently none can pass from him, and therefore, if a lease were made in the name of the attorney, though it were added also by virtue of a letter of attorney, or "by A B as attorney for C D," it would be a void lease. A covenant for the payment of rent, made between the covenantor on the one part, and the plaintiff as attorney for A B on the other, in which the plaintiff, for and in the name, and as attorney for A B demised &c., is void, for being void as to passing an interest in the land, it is also void as to the reservation of rent.' Vide Paley on Agency 153, 154.

3dly. As to the other objection, sometimes made to Combes's case, as an authority for the rule now under consideration, viz. that it is a mere *obiter dictum* in that case, which makes any distinction between a surrender of a copyhold, and a lease by an attorney; the reply is, that even admitting that it is a *gratis dictum*, that is now immaterial, as the distinction has been sanctioned by every subsequent case. I therefore regard this

case as a clear authority in support of the doctrine that the deed executed by Young and Blake is wholly void on account of its irregular execution under the power, (admitting, *gratia argumenti* that they had such a power.)

The next case to which I shall advert is Frontin *v.* Small, 2 Lord Ray. 1418. This was an action of covenant by Lessor *v.* Lessee, for rent. The defence set up was that the lease was void, as it did not appear that the lease was made as from James Frontin and in his name, (he being the principal,) although it did appear to be made by the plaintiff under a power of attorney from said James Frontin. Of this opinion was the whole court, and as the lease was void, so was the covenant also. This case is likewise reported in 2 Strange, 705. The case I have cited from Moore, 70, and the doctrine of Combes's case, 9 Coke 75, which distinguishes between ministerial acts and the passing an interest, were relied on, in this case of Frontin *v.* Small, and confirmed by the court.

But, it has been objected to this, and to many other cases, that they prove nothing more than the position that, where a deed by an attorney is simply in his own name, it is void, and that they do not establish the invalidity of those deeds which add to the attorney's name words which indicate his character. I have several times answered this objection, and pointed out its futility, and shown, by repeated authority, that it is wholly destitute of force. I admit that Martha Frontin merely signed her own name, and did not add to it her representative character; but she clearly showed that character in the body of the deed, and yet it had no saving effect; for, as I have often stated, the rule requires something more than the disclosure of agency, either in the body of the deed, or in its execution; it demands that the name of the principal, and the seal of the principal be used by the agent in its execution; and the deed is no more the deed of the principal (though the character of agent appear throughout the deed) than if it did not appear at all, unless it be executed in the name of the principal.

To this extent all of the authorities go. Vide 1 Roll's Abr. 330; Godbo. 389; 1 Salk. 96; Moore, 818, plac. 1106; 1 Bac. Abr. 319; 4 Bac. Abr. 140. 441; and here the learned author, Chief Baron Gilbert, remarks 'his adding, by virtue of the letter of attorney, will not help it, because the letter of attorney made over no estate or interest in the land to the attorney.' And in the same page, he emphatically sanctions

the distinctions taken in Combes's case, and fully sustains me in the doctrines advanced by me, when commenting on that case. Vide also White *v.* Cuyler, 6 T. R. 177.

Several of the elementary books have perpetuated some traditional errors in regard to the doctrine under consideration; and are sometimes very loose in their mode of stating the rule. Many of them say 'regularly the power must be executed in the name of the principal.' If by this word 'regularly,' is meant that it would be merely better, or more correct so to execute the deed, but that the rule is not imperative, they are clearly in an error. Or, if they mean by this word that there are exceptions to the rule, I equally deny it. My position is that the rule, when correctly stated, has no exception whatever; and that those cases which are usually stated as such, are merely where the rule never did apply, and never was intended to apply. The case of mere ministerial acts, and of simple contracts or instruments unknown to the common law, are not exceptions to the rule; they are cases in which the required premises in which the rule originated, and is based, are wanting.

So likewise there has been a very great looseness in stating the decision of the court, in the celebrated case of Wilks *v.* Back, 2 East, 142, and counsel, *arguendo*, have often endeavored to give to this decision a qualifying operation on the rule, which no subsequent judicial decision has sanctioned. I shall presently have occasion to comment fully on that case; and shall, therefore, now dismiss it.

There is a class of cases (as has been previously intimated) often cited by counsel, as reflecting light on the rule under consideration, but which should be kept distinct, as they are dependent, in a degree, on other principles than those on which the present question rests. I allude to those cases in which agents have, or have not been held personally liable, in consequence of the mode in which they have made deeds and contracts intended by them to bind their constituents. The rule on this subject is, that, if an agent desires to avoid a personal implication, he should take care to execute the deed in the name of his principal only. But it does not necessarily follow that because the deed is void as to the principal, it is binding, in any way, on the agent; nor is it a consequence that the agent is not at all bound, because he has been successful in binding his principal. Still, however, it is frequently the

case that where the agent has failed to bind his principal, he has personally implicated himself, and, on the other hand, where he has bound his principal, he has not bound himself.

There is also a distinction taken in this respect between public and private agents, the latter being often made responsible, where the former would be exempted. As to the personal liability of agents by reason of their irregular execution of deeds &c., vide the following cases: Bacon *v.* Dubarry, 1 Salk. 70; White *v.* Cuyler, 6 T. R. 177; Appleton *v.* Binks, 5 East, 148; Macbeath *v.* Haldimand, 1 T. R. 172; Unwin *v.* Wolseley, 1 T. R. 674; Myrtle *v.* Beaver, 1 East, 135; Rice *v.* Chute, 1 East, 579; Tippets *v.* Walker, 4 Mass. Rep. 595; Thacher *v.* Dinsmore, 5 Mass. Rep. 299; Forster *v* Fuller, 6 Mass. Rep. 58; Brown *v.* Austin, 1 Mass. Rep. 208; Freeman *v.* Otis, 9 Mass. Rep. 272; Hodgson *v.* Dexter, 1 Cranch, 363; Jones *v.* Le Tombe, 3 Dallas, 384; Sheffield *v.* Watson, 3 Caines Rep. 69; Durall *v.* Craig, 2 Wheaton, 45; Brown *v.* Morris, 2 Taunt. 374; 2 Atk. 623; 2 Marsh. Rep. 457; 7 Taunt. 159; and Paley on Agency, 296, 298. The whole of the foregoing cases belong more particularly to the case where the inquiry was as to the agent's personal liability; but, as that liability, in most of the cases, could have arisen from no other cause than the agent's neglect to comply with the rule under consideration, they will be found to shed light on, and to strengthen the rule.

So also no argument in favor of the validity of this irregular mode of executing deeds by attorneys, can be deduced from that class of cases in which one partner has bound his companion by deed, though the former only executed the deed. When these cases are attentively examined it will be found that they do not rest on the idea of an implied agency; or that the signing partner is ever competent by his sole act, to bind his copartner by deed. But these cases have been allowed merely on the ground that the one who did not sign or seal, adopted and made his own, the seal and signature to the deed, by being present at, and approving of the execution, in the mode in which it was done, and under the assumed right of the acting copartner. Thus, in the case of Ball *v.* Dunsterville 4 T. R. 313; one partner executed a bill of sale for both partners of their joint effects; but in the presence of the other, there being, however, only one seal, and one impression on the wax. The court held that they were both bound. In

this case, as well as all others of the same class, the court has never in one instance, intimated that the rule under consideration was in the least impugned or qualified; nor did the counsel, on either side, even argue these cases, as having any reference to the rule, but simply upon the ground that the presence and approval of the copartner, who did not sign, made the seal and signature by the other his own; and it is also to be additionally remembered, that, perhaps, in most, if not in all, of these cases the partner either signed the name of the firm, or the name of each member of the firm. It might, however, be admitted that if A and B be copartners, and A has a deed prepared, granting in the name of both, or of A only, partnership property, and this deed be signed by A only, in the presence and with the approbation of B, that the deed would be valid to bind B. And it might be further admitted that the deed would be valid though B's name appeared in no part of the deed; and though the deed was even silent as to its being partnership property that was about to be conveyed. Be these points as they may, I think it is very clear that this class of cases stands on its own peculiar ground, and in no degree questions the inflexibility of the rule.

It is also to be borne in mind that the rule in question, is applicable only to instruments known to the common law, as deeds of conveyance, bonds, &c. Hence bills of exchange or promissory notes may be signed in the name of an agent only, and yet be valid against the principal. If the authority be general, the fact of agency may be proved by matter *aliunde*, and need not appear upon the face of the paper; but if such bills or notes be made in virtue of special authority, the agency must appear by the instrument, though it is not necessary for the agent to execute it in the name of the principal. This is far from being an arbitrary and unmeaning distinction. For the rule itself depends much on the nature of grants and conveyances, and the distinction between ministerial acts, and those which actually convey or pass an interest. The fact is that the rule itself originated in times when specialties or deeds were the only means, or nearly so, of creating debts; a bond creates a debt, a simple contract is only evidence of a debt; a bond is a debt; it is *debitum in præsenti, solvendum in futuro;* but a bill of exchange, a promissory note, or other single contract is not, *in se*, a debt, but evidence only of a debt. Hence a bond is a species of conveyance of a

personal thing, as a deed or indenture is a conveyance of land, or other thing real. Hence is it that the rule, (as it applies only to sealed instruments of all kinds, because they actually create and pass a right or interest) never did and could not, on principle, apply to a simple contract which does not *per se* create or pass a right, but merely evidences its existence. It is however, quite immaterial to inquire into reasons, since the law is settled, that the rule applies only to specialties. Any number of cases, therefore, or bills, notes, or other simple contracts, in which the agent signed his own name only, and which were held obligatory on the principal, cannot be entitled to the least weight or consideration against the rule, because, as the rule never claimed to embrace them, no inference of any relaxation of the rule can possibly be drawn from them. I shall, however, state the leading cases on simple contracts, in order to embrace in this opinion every possible class of cases which any person might be inclined to refer to. Cator *v.* Hoste, 2 Bos. and Pull. 557; Long *v.* Colburn, 11 Mass. Rep. 97; Mayhew *v.* Prince, 11 Mass. Rep. 54; Stackpole *v.* Wells, 11 Mass. Rep. 27; Emerson *v.* The Providence Hat Man. Com., 12 Mass. Rep. 237; Arfridson *v.* Ladd, 12 Mass. Rep. 173; Rathbone *v.* Budlong, 15 John. R. 1; Mechanics' Bank *v.* The Bank of Columbia, 5 Wheat. 326; 1 Dane's Abr. page 201, § 7; page 203, § 15, 16; page 428, § 32.

The foregoing cases establish,

1. That bills, notes, and other simple contracts need not be executed by an agent, in the name of his principal:

2. That the person executing the simple contract must have had an authority so to do, otherwise he will be personally bound:

3. That generally the agency must appear on the face of the contract, and then the principal only is bound, though the agent did sign his own name only:

4. That if he exceeds his authority, he may be personally liable, though his character of agent be disclosed in the contract.

I shall now refer to a few American cases in which the rule has been as strictly enforced here as in England. Nor am I aware of a single case in which the rule has even been doubted in this country.

The doctrine was examined in the case of Fowler *v.* Shearer, 7 Mass. Rep. 14. A promissory note was given for the purchase money of an estate conveyed to the defend-

ant, in virtue of a power of attorney given by a husband to his wife, who executed a deed under this power to the defendant, but she executed it in her own name. It was argued that this deed of conveyance was *ipso facto* void; because, first, it could not operate on her own estate, she being covert; and secondly, not on her husband's interest, because the power had not been legally executed. Chief Justice Parsons (among the most distinguished of American jurists) held, that 'if an attorney has authority to convey lands, he must do it in the name of the principal. The conveyance must be the act of the principal, and not of the attorney, otherwise the conveyance is void. And it is not enough for the attorney in the form of the conveyance, to declare that he does it as attorney; for, he being in the place of the principal, it must be the act and deed of the principal, done and executed in his name.'

So likewise, in the case of Bogart *v.* De Bussey, 6 John. Rep. 94. The court said, 'the agreement upon which the suit is brought, was made by the plaintiffs as attorneys for A B, and they executed it as attorneys. If the covenant is to be considered as made with A B the principal, the suit ought to have been brought in his name. If, however, it is to be considered by and with the attorneys in their own names, as attorneys, then the whole agreement is void, and no action can be maintained upon it. Frontin *v.* Small, 2 Lord Ray. 1418; Com. Dig. Tit. Attorney, C. 14. So that, *quacunque via data*, judgment must be for the defendant.' So again, in the case of Elwell *v.* Shaw, 16 Mass. Rep. 42, it was held that a deed executed by an attorney, must, in order to be valid, be made in the name of the principal, and that the deed was equally void, though it recited the letter of attorney from the principal, and declared that the said attorney in virtue thereof conveyed the lands to the grantee, and set the name and seal of the *principal*, though in fact the deed was signed in the attorney's name.

The last American cases to which I shall refer, occurred in Maryland, viz. Smith's Lessee *v.* Perry, 1 Harris & M'Henry's Rep. 706, and Harper *v.* Hampton, 1 Harr. & John. 622. The first of these cases was decided in the General Court in 1783, on a point saved, and was argued, on both sides, by the most eminent counsel, and decided by judges of distinguished learning. The report of the case is very meagre, neither reasons nor authorities being assigned. The deed in question, recited the power of attorney to sell, and it was executed in

the agent's name, but adding 'attorney in fact of John Smith.' The point was, whether this deed and power constituted a sufficient conveyance in law to vest the title of the lands in the defendant; and the court gave judgment for the plaintiff.

The other case, Harper *v.* Hampton was argued in the Court of Appeals in 1805. The most eminent legal talents of the state were engaged in the cause. Johnson, (late Chancellor,) Pinkney, (late Attorney-General U. S.,) and Mason, distinguished for learning in the *realty*, argued for the defendant against the attorney's deed. The late Robert Goodloe Harper, Philip Barton Key, and Luther Martin, all lawyers of great celebrity, contended in favor of the deed.

Jacob Rumph gave the usual power of attorney to R. G. Harper, authorizing him to sell and convey certain lands. The deed to the purchaser recited this power, and also the survey made by Rumph. It stated throughout the deed that the conveyance was made in virtue of the said power, but it was signed,

Robert Goodloe Harper, } *Seal.*
Attorney for Jacob Rumph. }

The deed by Young and Blake is so similar to R. G. Harper's deed, in every respect, that whatever, on this point, could be urged as to the one deed, would be equally applicable to the other, except that Harper had an express authority to convey, whereas Young and Blake had none whatever.

The plaintiff's counsel, in affirmance of the deed, resorted to various arguments which I have anticipated, and, perhaps, satisfactorily answered, except the case of leases made in Maryland by the agents of the lord proprietor, which they contended had always been held valid, though never executed in the name of their principal. To this I reply, 1. That the direct question as to the validity of those deeds was never made or decided, and no inference in favor of their validity can be made from the mere fact of their never having been disputed, for it may be readily imagined that there were but few in the province inclined to call them in question. 2. The lord proprietor did not grant lands as an ordinary individual. His agents were not attorneys specially authorized for the purpose of leasing or conveying manors; they had large and very discretionary powers. 3. The universality of this irregularity in the lord proprietor's grants and leases was such, as would have rendered an unfavorable decision of little avail, as they would have been in every instance followed by new assurances. And lastly, an extreme case of this public kind can afford no fair ground of

reasoning in favor of the validity of similar deeds when executed by private individuals. In this case of Harper *v.* Hampton, the court expressed no doubt as to the nullity of the deed executed by Mr. Harper, and in giving their opinion the court refer to the case of Wilks *v.* Back, 2 East, 142, to which I have previously alluded, as a case which has been singularly misunderstood by some, and was appealed to by them as sanctioning the position that a deed, by an agent, is valid if the agency appear in the body of the deed, and the character be added to the agent's signature; a doctrine which the court certainly did not admit in this case of Harper *v.* Hampton. I shall presently have occasion to analyze the case of Wilks *v.* Back, and doubt not that it will be made sufficiently manifest that this case has been frequently stated unfairly by elementary writers, and not less often wrested by counsel, *arguendo*, from its true meaning, to suit their views, and to countenance a distinction which the learned judges, who decided it, never intended, and which no subsequent adjudication has in any degree sanctioned, or could sanction, without virtually abolishing the rule. But, to return to the case of Hampton *v.* Harper, I have only further to remark that the marginal note to this case has stated the rule with a verbal qualification, which the court's opinion does not warrant. The marginal note says, 'A deed by an attorney is invalid, unless his authority is strictly pursued. Such a deed should regularly be in the name of the principal.' Page 622. But the court, in page 709, makes use of no such qualifying word. The whole case, as well as the court's opinion, show that the attorney must execute the deed in the name of the principal, and consequently this abstract of the case should not have used the word 'regularly,' as it seems to imply some qualification.

I shall now conclude this opinion (already extended to an unusual and inconvenient length) by a critical examination of the case of Wilks *v.* Back, 2 East, 142, to which I have more than once adverted.

It is a singular fact, in regard to this case, that an erroneous view of its extent and meaning has partially prevailed, and been traditionally preserved, though the courts have never so understood it, and the case is, in itself, free from obscurity, when carefully looked at. We sometimes meet, in the elementary writers, a reference to this case, as establishing the position 'that although the attorney must execute his power in

the name of his principal, no particular form of words is required to be used, so as it appears to be the act of the principal. Hence signing a deed M. W. for J. B. is as good as J. B. by his attorney, M. W. Wilks *v.* Back, 2 East, 142.'

The above is an extract from the note of the American editor of Bac. Abr. vol. 1, page 319, 320. This extract may serve as an example of the erroneous mode of citing this case, adopted by some writers. I deny that the case cited maintains any such position, for this would be to reverse all preceding cases, and to make that case quarrel even with itself. It never has been understood by the courts to have introduced either a new rule, or the least qualification of the old one. The case explicitly requires the agent to sign the principal's name, and if that be signed, it merely decides that if the attorney also signs, it is immaterial which name precedes the other. But this is a very different thing from the position laid down in the above note, viz. that if M. W. be the agent of J. B. he may execute the deed, either M. W. for J. B. or J. B. by his attorney, M. W. The former, I contend, is void; the latter good, since every authority, from that in Moore's Reports to the present day, prove that the agent's signature is not helped by adding his character. So also every English and American case since Wilks *v.* Back, prove that no such meaning should be attached to that case. That Chief Justice Parsons did not so understand the case in East is manifest from the case of Fowler *v.* Shearer, 7 Mass. Rep. 14, in which he expressly repudiates the idea that any thing short of signing the name of the principal will answer. But let us examine the case of Wilks *v.* Back itself, and we shall find that nothing more was decided than that a deed is executed in the name of the principal when it is thus executed,

Mathias Wilks, [Seal.]
For James Browne, Mathias Wilks, [Seal.]

The marginal note to the case says 'One who executes a deed for another, under a power of attorney, must execute it in the name of his principal; but, if that be done, it matters not in what form of words such execution is denoted by the signature of the names; as if opposite the seal be written 'for J. B. [the principal] M. W. [the attorney] (L. S.)' It is to be remarked that even this marginal note is not quite correct, as it has omitted to state that there were two seals.

The facts of the case were that Wilks and Brown, the

plaintiffs, were partners. Back, the defendant, stood indebted to them, and they entered into an agreement to submit their accounts to arbitration. For this purpose Brown constituted his partner Wilks his attorney to settle all accounts, and to execute any deed whatever, which might prove necessary for the settlement of all their accounts. It was in virtue of this power that Wilks executed the arbitration bond which gave rise to the question of the due execution of a deed by an attorney. It was sealed and delivered by Wilks, for himself and his partner Brown. Here, then, we find two seals, and also that Brown's name appears on the deed as well as Wilks's. If we attend to the argument of the counsel, and the opinions of the judges in this case, we shall find that neither contemplated the abolition, or even a qualification of the rule.

Garrow and *Parnther* argued in favor of the deed. They admitted the rule to its fullest extent, and contended that it was fully satisfied, as Wilks signed, sealed, and delivered in the name of Brown as well as of himself. That the signing his own name twice was immaterial, since he also signed the name of Brown, the principal; and that if there had been but one seal, it would have been sufficient.

Erskine and *Comyn contra* argued against the deed, and pressed the settled cases, which they said were not satisfied by this mode of execution, as the agent, though he signed the name of the principal, placed before it the word 'for,' whereas he ought to have signed it 'James Browne, by his Attorney, Mathias Wilks, [Seal.]' But the court were decided in the opinion that there had been a full compliance with the rule.

Lawrence, Justice, remarked (among other things) that 'Wilks signs his own name alone opposite to one seal, to denote the sealing and delivery on his own account, and then, opposite the other seal, he denotes that the sealing and delivery were for James Browne. There is no particular form of words required to be used, provided the act be done in the name of the principal.'

Here it is manifest the judge had no doubt that this deed was executed in the name of the principal, whereas the note in Bacon's Abridgment seems to think that this case justifies the position that the simple signature M. W. for J. B. is sufficient.

Le Blanc, Justice, said, 'Wilks first signed in his own name for himself, and then, to denote that the act was also

done in the name of Browne, he signed it again for James Browne. I cannot see what difference it can make as to the order in which the names stand.'

Thus far the case is certainly quite clear of the least doubt, and advances no such doctrine as is to be found in the note complained of, and in some other elementary writers, and arguments of counsel interested to impugn the rule.

But we have yet to cite the opinion of the third judge, Grose, which I admit advances the doctrine stated in the note, and which I have been endeavoring to show is not the decision of the court in the case of Wilks *v.* Back. Grose stated the position in words; but it is quite clear that it was not his intention so to do. It was a careless expression, the full force of which did not occur to him. I infer this, *first*, From the fact that the decision of the court establishes a contrary doctrine from the mere *obitur dictum* of Mr. Justice Grose. *Secondly*, The marginal note clearly shows that no such doctrine was so understood by the reporter. *Thirdly*, Mr. Justice Grose himself says the bond must be executed by Browne as well as Wilks, and therefore he must have meant that under all the facts and circumstances of the case before him, the bond was well executed by Wilks the attorney. He could not have meant that the mere signature, Mathias Wilks, attorney for James Browne, is equivalent to James Browne by his attorney, Mathias Wilks, because this would be deciding on a case not before the court. All the other judges state the facts with minute care; Grose is obviously less careful, but did not mean to strike out a doctrine different from his brethren, and not called for by the facts of the case. *Fourthly, and lastly*, I am of this opinion because all subsequent cases contradict Grose's *gratis dictum*, and take the decision of that case as fully establishing the rule, in all the strictness in which it has been ever maintained; and I may add that the error I have endeavored to point out is by no means universal. The best authors state the point decided in this case from 2 East, as I now represent it. Vide Paley on Agency, 153, 154, and the learned American editor of Comyns's Dig. vol. 1, 781, note.

The truth is that those who have so erroneously stated the case of Wilks *v.* Back, have repeated the hasty *obiter dictum* of Mr. Justice Grose, instead of the *decision of the court*, and one inaccurate writer has copied from another.

Summary.

On the entire case, therefore, which I have perhaps, so tediously considered, I am of opinion the plaintiff in this cause, is entitled to recover,

1st, Because Young and Blake had no power to convey.

2d. Because there was a covenant only, on the part of John Mullins for him to convey.

3d. Because no grant was intended, and if one had been contemplated, it would have been inoperative as a source of title to the defendants, as it would have been the grant of a naked possibility.

4th. That if Young and Blake had power to convey, still they have not so conveyed as to divest the estate from the plaintiff, having failed to execute the deed in the name of John Mullins, which, as attorneys of Mullins, they were legally bound to do.

Art. VI.—HOFFMAN'S LEGAL OUTLINES.

Legal Outlines, being the Substance of a Course of Lectures now delivering in the University of Maryland. By David Hoffman. *Indocti discant, ament meminisse periti. In three Volumes. Vol. I. Baltimore. Edward J. Coale.* 1829. pp. 626.

Every author in making a book, and so every speaker in addressing an assembly, supposes his readers or auditors to have made certain acquisitions of knowledge. They are presumed, in the first place, to understand the language used; and this, in the case of a science in regard to which the student's mind is a complete *tabula rasa*, as in the elements of geometry, for instance, where he is presumed not to know what is a straight line, a point, an angle, or a plane. These are all explained to him in preliminary definitions. The only preparatory stock of knowledge required of him, is, that of the meaning of the small number of words used in the definitions and demonstrations, without being previously defined. But in most treatises, public discourses, and private conversations, the reader or hearer is presumed to have a pretty large stock of knowledge, and it is a point of some delicacy of discrimination

to determine what may be presumed to be known, and what should be explained by an instructer who undertakes to teach an art or science. One obvious rule in this case is, not to introduce any thing which may not explain, illustrate, or in some way throw light upon, or facilitate the understanding of, the general subject in hand. In the flood of works with which the press inundates the world in the present times, this rule is of great importance. In the old times, readers were supposed to be more at leisure, and it was thought to be an essential part of a finished treatise, that it should be introduced by some elegantly written discussion, which had little or no connexion with the subject. Thus Cicero's Treatise de Republica is prefaced by a comparison of active and contemplative life, and Sallust introduces his account of the war of Jugurtha with an essay upon the comparative glory of carrying on a war or writing a history of it. These preludes were written in the most finished style, being a sort of ceremonious introduction of the author to his readers, whose attention was thus to be conciliated to what was to be said upon the actual subject. Modern works in law, and on all other subjects, abound in introductions sufficiently remote from the subject. Molloy commences his book on maritime law with the remarks upon the great kindness of Providence in 'furnishing man with wisdom,' &c. so that 'he could build a ship, raise a fort, and make bread or cloth.' And even Mr. Park, who is a rigid practical lawyer, begins his treatise on Insurance by an introductory discourse on marine commerce.

Something in the nature of an introduction is indeed very proper, and often no less useful than ornamental, not only in every written treatise or public discourse, but even in an ordinary conversation. We always begin at some distance, greater or less from the main subject, but it is esteemed a mark of good taste and good sense to begin with something directly connected with and leading to it. A great part of this volume of Professor Hoffman is preliminary to his real subject, the law; and the first question that presents itself, in opening the volume, is, as to the connexion of these various subjects, which fill so large a space, with the great subject to be explained and illustrated. In regard to this question, we cannot but think that he has taken too wide a range. That he himself is of this opinion we infer from what he says in his introduction, where he gives us a reason for publishing the volume sepa-

rately from the two others, which are to complete his entire work, that it 'has been induced by the consideration that most of its topics are a little too metaphysical to make their due impression through mere oral delivery; besides which the remaining titles are gradually becoming sufficiently extensive to occupy all the time which can at present be allotted to the duties of the chair.' We hardly think that the subjects themselves of this volume are liable to the first of these objections, since, notwithstanding the metaphysical character of some of them, they are certainly as capable of being made the subjects of lectures, which might engage the attention of young students, as any part of the municipal law. That they are not very directly connected with the study of the law seems to be thus taken for granted by the author, as he proposes to omit this part in delivering his lectures to his classes. It is true he proposes that the students shall read this part, but they are no more likely to read his volume, perhaps, than they would have been to read the other numerous works upon the same subjects.

But our readers will form a more just opinion of the volume if we follow the author through the various topics with which it is filled, the first of which are 'the origin and nature of man, and his physical and moral constitution.' We regret that this lecture was introduced, for the world has been flooded with general disquisitions on 'mind, matter organised and unorganised, life, instinct, sensation, intelligence, animals, vegetables;' and if an author should think he could enter these wandering mazes without perplexing himself and his readers, one of the last places of making such an experiment, it seems to us, would be in a practical treatise on the law. When the student enters upon his career of legal studies, panting and on fire to train and equip himself for the actual *bona fide* conflicts of the forum, it is really discouraging to him to be conducted to some cavity of a rock, to study the properties of the sea-anemone, or be thrown into an abstraction on the subject of Des Cartes's theory that there is no mutual action and reaction between the mind and the body, or to be confounded with the old question of the moral liberty and free-agency of man, with which he has already been severely exercised by his tutors in moral philosophy and metaphysics.

The next lecture, which treats 'of man in a state of nature,' has a more direct bearing upon the subject of law. A very

useful inquiry to the student is here instituted, namely, what is a 'state of nature?' Though we do not often meet with this phrase in municipal law, yet even there it is sometimes used, and in the treatises on natural and national law, is often repeated. It is therefore well worth while for the student to attach some definite meaning to it, and to settle in his mind its different uses, from which will result one considerable advantage at least, for he will readily perceive that in a great many pages where writers are talking of *a state of nature*, they use words without any precise ideas, and so he saves himself the trouble of puzzling himself about their meaning. Now the state of nature and individual independence, as distinguished from a state of society, mutual dependence, and contracted obligations, is one in which the whole human race never has been, and never can be, placed, as Mr. Hoffman very justly remarks, for these social bonds fix themselves upon men from the time of their birth, and would do so to the first offspring of the solitary couple who constituted all the inhabitants of the earth. But still nations, not bound to each other by treaties or compacts, are in a state of nature, and so thousands of individuals have met, since time was, who were, in respect to each other, in a state of nature, being beyond all civil jurisdiction and bound by no obligations in their conduct towards each other, except those arising out of the moral constitution of man, or what is strictly the law of nature. Though nations, in respect to each other, are therefore in a state of nature as far as laws are concerned, and though individuals have often found themselves in this state in respect to each other, yet when we speak of all men as having at some time been in this state, it is so far entirely an imaginary one.

This lecture includes the consideration of Hobbes's theory of the natural hostility of the human race to each other, which Mr. Hoffman combats, as might be expected, for it attacks the foundation of all morals and laws. It resolves all rights into that of the strongest. The foundation upon which that philosopher builds his theory, is certainly a very flimsy one, nor can we perceive that the opposite one is more satisfactory. Hobbes says men are naturally at war; the opposite theory assumes them to be at peace. Now it is evident that they would be naturally at war or peace, according to their dispositions and motives, and to suppose a uniformity in this respect, all the world over, if government should be at once abolished, all

laws abrogated, and all contracted obligations dissolved, would certainly be quite a gratuitous and unsupported assumption. It would appear at once that the natural state of man is both one of war and peace, at the same time between different individuals, and successively between the same individuals. And whatever result may be supposed to follow such an experiment, it would prove nothing either for or against the right of the strongest. The idea that power confers right, is one of the most repulsive and abhorrent to the moral sense or perceptions, that can be stated; and yet we feel abstractedly and also practically, in every day's experience, that power is the only sure guaranty of right, so that we naturally associate the two, and the first thing a man seeks in a state of nature or any other state, is, to possess himself of the power to vindicate his rights, and this is one of the first and strongest motives to the formation of communities, and to entering into the thousand and ten thousand associations which checker civil society.

Having, then, settled what is to be understood by the state of nature, the author proceeds, in his third lecture, to consider 'the rights of nature.' Right is defined, and the different divisions of perfect and imperfect, distinguished, though we do not perceive clearly and definitely, what Mr. Hoffman understands to be an imperfect right. He says that a right of one man, is in all cases, attended by a corresponding obligation in others; and an imperfect right is attended, of course, by an imperfect obligation on others to submit to it. The distinction of Barbeyrac that a perfect right is one that may be asserted by force, and an imperfect one such as may not be so asserted, has been questioned, and the various casuistry upon the subject is recapitulated by Mr. Hoffman, who proposes, in the end, to cut the knot by substituting *primary* and *secondary*, for *perfect* and *imperfect*. But this does not, that we can see, clear up the subject, which is certainly a very intricate one. Has a person in distress a *right* to alms? Have the people of one nation a *right* to drink of a river within the limits of the territory of another, when no possible injury can result? If a man be fallen into a slough, has he a *right* to another's assistance to extricate him? We will not stop to settle these inquiries. There is obviously some distinction between these rights or claims, and the right which a man has to cook a fish for himself in spite of all the world, when he has caught it, but what the distinction is, in principle, is a matter of some subtlety

of investigation, which does not seem as yet to have been very satisfactorily made.

The fifth lecture is occupied with the subjects of primary society, and the original impulses to the formation of civil associations, and here are considered, the domestic relations, patriarchal government, and Hobbes's theory of a natural state of war.

We observe in this lecture what we remember to have remarked in Vattel and other writers on the law of nature and nations, instances of propositions stated as a part of that law, without any train of reasoning in support of them.

'The marriage contract is said to differ from all others in this, that it is necessarily of perpetual obligation, and cannot, like all other contracts, be dissolved by the mutual consent of the parties by whom it was made. This point has been argued by the commentator on Grotius, with his usual ingenuity, though perhaps with occasional sophistry. The objects of marriage, and the obligations it imposes in regard to the offspring, render it indissoluble by the mere act of the parties. Nay, the consent of the offspring, when of full age, added to the sanction of the community, would not justify the parties in dissolving the contract. Divorces, therefore, are against the law of nature. They were indeed permitted by the Mosaic law; but the God of Nature ordained this through the Jewish legislator, for special reasons; and as the laws of nature are of his institution, he alone was competent to allow the dissolution of a contract, otherwise perpetual in its obligation. This view of the subject appears to be confirmed by Christ, who, when he repealed the Mosaic law on this subject, expressly says, that though Moses (as the minister of God) allowed the Israelites to put away their wives, yet "from the beginning it was not so."' pp. 148, 149.

Now this is evidently an imperfect and unsatisfactory way of expounding the law of nature and nations, which the author must support upon such arguments as he can adduce in favor of his position, and few, if any of its precepts, are so clear and intuitively evident, as not to require an exposition of their grounds. There are, however, very few instances, in this volume, of hasty declarations of precepts unaccompanied by the premises from which they are deduced.

Domestic relations, patriarchal government, and the motives that first combine men in civil associations being disposed of, the author is led by the natural order of subjects to the consideration of the rights and obligations of government. We are here seeking for the deep moral foundation upon which the

whole superstructure of political and civil duties rests. Why are we bound to obedience to laws, and fidelity to the government? Socrates put this duty upon the basis of the obligations which he owed to the laws, for protection, education in gymnastics, music, &c.; and these obligations were, in his estimation, so sacred, that he considered it a moral offence in him to attempt to escape from the sentence of death which had been unjustly pronounced upon him, since it had been pronounced by a competent tribunal, and his avoiding it would accordingly bring these venerated laws into contempt. In the lecture before us Mr. Hoffman brings under consideration the various theories of political and civil obligation, in a very clear and well arranged discussion of the subject, in which he examines the divine right of hereditary incumbents, utility, prescription, ancient consent of the governed some hundred or a thousand years ago, but finally places the whole obligation upon the force of the supposed social compact. But we very much doubt the stability of this basis. In that passage of Algernon Sidney's work on government, which was copied into the indictment upon which he was tried and condemned, he seems to consider the *consent* of the governed, as the only title of the governors to hold their power, and this seems to be a more just description than *contract*, for those who found government upon a supposed contract always make it such a conditional one, that it in fact amounts to no more than the consent of the governed. But it seems to us to be quite impossible to make out either a contract or consent. In the first place what right have the majority, except that of the strongest, to institute a government and force it upon the minority? If the obligation of allegiance rests in compact or consent, we find that half of the nation never did consent or contract. And if all had done so some ten years or a thousand years ago, it will not be pretended that their consent or agreement can bind us. Mr. Hoffman maintains that though a man may sell his own liberty and validly bind himself to be a slave for life, yet he cannot barter away the liberty of his posterity, he cannot sell himself and his heirs forever. It is immaterial what contracts were entered into or consent given by some former generation, on the subject of government. In a question of altering a constitution, or making a rebellion or revolution, the title deed of prerogative or prescription, however formally executed, is very little regarded. Nor are even the defects of the government

a sufficient justification of an attempt at innovation in all cases. The real practical question is, whether any steps taken for the purpose, will probably mend it, or end in making it worse. It appears to us to be altogether a question of utility or expediency, upon which ground it is in fact placed by many writers. If it be so, then the regard which every individual has to his own welfare, and is bound to have for that of the rest of the community to which he belongs, is the immediate foundation of his obligation of obedience and allegiance, and if this position be just, the rights of the government will correspond to those obligations. Those who administer the government and who are its legal and authorized functionaries, have a right, and in short are bound to administer it in its prescribed forms until others can be substituted. But the strictest compliance with the supposed social compact on the part of the administrators, according to the established forms, is in many cases no argument whatever against a revolution, any more than on the other hand the widest departure from the obligations of this compact in other cases, is a conclusive argument in favor of an attempt at reform. We do not imagine that there is any abstract question of this sort in the case. The practical expediency and the probable result are to be taken into view, and these appear to us to be two material, decisive grounds of inquiry. A rebellion and attempt at revolution are as much a duty in some cases, as obedience is in others, and this whether the government be new or old, or instituted by force or compact, or administered according to its principles or in violation of them. Whatever may be the assumed foundation of a government, it will doubtless be agreed that certain obligations are imposed upon the governors, the violation of which is one circumstance in vindication of an attempt at reformation or revolution, but it is not of itself and under all circumstances conclusive. In this view of the case the social compact is a thing of no great practical importance. And it has of late years, if we are not mistaken, ceased to make much figure, though this has been a revolution-making and constitution-making period.

Mr. Hoffman introduces the important inquiry in this part of his volume, whether a dissolution of a political fabric or a revolution, dissolves all laws and civil and national obligations; whether it reduces the members of the community to what is considered 'the state of nature;' and he is clearly of opinion

that it has not this effect. The opinion adopted on this question, will evidently lead to very weighty conclusions. We quote a part of the reasoning upon the subject, which appears to be able and satisfactory.

'The jurisdiction or sovereignty of a state may exhibit itself in various forms, and be exercised by various ministers. One man or many may exert it over the rest, and over the territory which they inhabit. It seems, then, to follow from this circumstance, and from the remarks just made on the nature of jurisdiction, that the change or dissolution of a government does not destroy this sovereignty, and thereby reduce the members of the community to a state of nature. Hence, though the depository of its jurisdiction may be changed, the power itself resides in the nation at large: the taking of the sovereignty out of the hands of any particular person or persons, and even an utter uncertainty where particularly to place it, can have no other effect than to reduce the community to that situation in which it was before the jurisdiction was placed in special hands. For to the formation of a government two circumstances are requisite; first, that a body of men shall unite to form a political society; and secondly, that they shall have determined in what form it shall be ruled: hence the social compact, and the constitutional compact are two very distinct things. It appears, then, to be obvious that the dissolution of the government, which is the constitutional compact, cannot reduce the members to a state of nature, but merely to a state of social and civil union; in which case the sovereignty has reverted to that abstract entity called the state or nation. When an event of this kind happens therefore, as it did in Rome, on the expulsion of Tarquin; in England, on the decapitation of Charles; in France, when they executed their king, and dissolved the government; and in the United States, when we absolved ourselves from all allegiance to the British throne and nation, and declared ourselves independent: in all these cases, I say, the members of those states were, indeed, no longer subject to the entire code regulating the political state, or form of government. Still they were not without law, but remained under the general obligations resulting from the nature, ends, and necessities of civil society; and likewise subject to all the civil and criminal laws which were not necessarily involved in the downfal of the political state.' pp. 223, 224.

In the seventh lecture on the properties and characteristics of law, the author enumerates twenty different definitions of law by so many writers, and finally gives his own. He notices *ex post facto* laws, and takes the position that the clause of our constitution which prohibits such laws is only declara-

tory of the general law, as well as the common law of England, for which he cites numerous authorities.(*a*) Indeed the very definition of law—a rule of action—shows that it cannot be applicable to an act done before the rule existed, for how can an action violate a rule which does not exist? And this doctrine on the subject of retrospective laws naturally leads to the consideration of the promulgation of laws, and the great palpable defect, heretofore existing in the British legislation, is noticed, resulting from the singular maxim that a session of parliament is but one day, and that, the first day of the session; a maxim that has just as much sense as one which should pronounce the whole year to be one day, and that the first of January, upon which all notes should be paid that were to fall due in the year. The palpable absurdity of this maxim and its injustice in subjecting men to penalties for breaking laws that did not exist, finally induced the enactment of the statute of 33 Geo. III., ch. 13, which makes the operation of a statute commence from the day of its receiving the royal assent, if no other day is mentioned for this purpose; this in part remedies the evil, and puts the British legislation upon the same footing with ours in this respect. The consequence of this rule is to render laws in some cases practically *ex post facto*, as in the case of the brig Ann, 1 Gallison's R. 62; for a law of which a party cannot possibly have knowledge, is, as to the regulation of his conduct, to all practical purposes, the same as if it had not been enacted. A wrong may be thus occasionally wrought, and be the proper subject of redress by the executive or legislature, but we very much doubt whether the case admits of a general remedy.

In this part of the volume Mr. Hoffman touches upon the subject of codification and the works of Jeremy Bentham, whom he treats with some respect. It is certain that Mr.

(*b*) 'Bracton lib. 4, fol. 228. Digest 50, 17, 75. Code 1, 14, 7. Taylor's Civil Law, 168. Bacon's Abridgment, 6 vol. 370, Statute (C.) 2 Institute 292. 1 Black. Com. 46. Coke Litt. 360. Gilmor v. Shuter, 2 Modern Rep. 310. Bacon De Augm. Scient. lib. 8 cap. 3. Puff. N. & N. book 1, ch. 6, sec. 6. 4 Burrow's Rep. 2460. 2 Shower's Rep. 17. Calder v. Bull, 3 Dallas's Rep. 386. Ogden v. Blackledge, 2 Cranch's Rep. 272. Wilkinson v. Myer, 2 Lord Raymond's Rep. 1352. Ham v. McClaws, 1 Bay's South Car. Rep. 93. Osborne v. Hager, *same*, 179. Bowman v. Middleton, *same*, 252. Dash v. Van Kleeck, 7 Johnson's N. York Rep. 477. Society v. Wheeler, 2 Gallison's Rep. 103. Dartmouth College v. Woodward, 4 Wheaton's Rep. 518. 2 Coke's Institute, 526. 4 Inst. 25. 1 Plowden's Comm. 79. 1 Levinz's Rep. 91. 6 Brown's Parlia. Cases, 553. Latless v. Holmes, 4 Durnf. and East's Rep. 660.' p. 276.

Bentham has survived the ridicule and contempt of which he was formerly the subject, and though no legislator can consider him as a safe guide, or good authority, there is no doubt that his writings have had a powerful and very salutary effect upon contemporary legislation, not merely by pointing out improvements, but more perhaps in consequence of the merciless satire and irresistible force of illustration, with which he has exposed some of the absurd maxims and senseless prejudices, which masked many hoary abuses and venerable follies. The plan proposed by Bentham, and which appears to be approved by Mr. Hoffman, is certainly worthy of attention. He proposes an analysis of all the subjects of legislation, which Mr. Hoffman adopts. Under these various heads it is imagined that an abstract universal code might be framed, which should contain all the essential enactments which ought to be embraced in the code of every nation, and from which each might improve its own laws. The difficulty is, however, that the moment you get beyond the veriest first principles, you are entangled in the peculiar national forms, prejudices, and institutions, which cannot be dealt with in a general abstract code. A plan for the reformation of the laws of any community, must be framed upon a knowledge of its existing laws and institutions. From the times of Solon to the present, it has been quite as difficult to know what laws a community will bear, or are fit for, as what would be best for them, provided their character and circumstances admitted of their adoption.

After an examination of the foundation of the laws of nature in the ninth lecture, the various forms of government are treated of in the tenth, and the works of the most distinguished writers, both ancient and modern, from Confucius to the authors of the Federalist, are cursorily reviewed.

The last lecture, and one of the most satisfactory in the volume, is on the subject of the feudal law. It may be advantageously read by the student, after the first volume of Robertson's Charles V. As treated by Mr. Hoffman it is by no means a dry, forbidding subject, but may be read with facility and interest by a novice in legal learning. In the course of this lecture the author touches upon the subject of conflicting laws and jurisdictions; he says in a note,

'The great number of territorial jurisdictions which obtained, not only in France, but in the Netherlands, Germany, &c. necessarily originated a great diversity of legislation, customs, and ju-

dicial procedure. Frequent collisions arose from this diversity, and caused the occurrence of questions of extreme interest respecting jurisdiction. A marriage, for example, valid in one place, might be void in another; a divorce granted by one tribunal, might not be respected in a second; a will executed in conformity to one system of laws, might not correspond with the requisitions of another; a contract might be affected by the law either of the place where it was made, or that in which it was litigated, or that in which it was designed to be executed, or that in which the subject of the contract was situate, or, finally, that of the domicil of one or both of the contracting parties: and so as to the remedy, and various pleas, which might be resorted to in one tribunal, and not in another. These are questions of intrinsic difficulty, on which the Continental jurists have displayed surprising ingenuity and learning, unhappily little known to English and American lawyers. The vast variety of baronial and provincial customs, laws and tribunals in France, rendered these conflicts especially frequent in that country. It gave rise to a body of learning, and of refined distinctions as to the extra-territorial operation of statutes, which the lawyers of this country are particularly called on to examine, since American jurisprudence, arising, as it does, from the laws and customs of twenty-five independent sovereignties, is not likely ever to become a very homogeneous system, and must necessarily give rise to a series of questions very similar to those occasioned by the various systems of laws existing in continental Europe. I am happy to say that this subject has been recently taken up by an eminent American civilian, Mr. Livermore.'

'The student may hereafter consult, at his leisure, Toullier's Droit Civil, tom. 10, 117; Voet De Statutis; Hertius *De collisione legum;* Emerigon des Ass. tom. 1. c. 4, sec. 4; Huberus, 2 vol. lib. 1, tit. 3; Rodenberg *De jure quod oritur ex statutorum diversitate*, tit. 1, cap. 1; and the following English and American authorities: Sill *v.* Warwick, 1 Henry Blackstone's Reports, 690; Robinson *v.* Bland, 2 Burrow's Reports, 1077; Solomons *v.* Rice, 1 Henry Blackstone's Reports, 131; Hunter *v.* Potts, 4 Term Reports, 182; Phillips *v.* Hunter, 2 Hen. Black. 402; Melan *v.* Fitzjames, 1 Bosanquet & Puller's Reports, 138; Selkrig *v.* Davis, 2 Dow's Reports, 230; Dalrymple *v.* Dalrymple, 2 Haggard's Reports, 54; Pippon *v.* Pippon, Ambler's Reports, 25; Bruce *v.* Bruce, 2 Bos. & Pull. 229, *in notis*; Norris *v.* Munford, 4 Martin's Louisiana Reports, 20; Ranway *v.* Stevenson, 5 Martin, 23; Saul *v.* His Creditors, 5 Martin, 569; Fisk *v.* Chandler, 7 Martin, 24; Thuret *v.* Jenkins, 7 Martin, 318; Bird and others *v.* Caritat, 2 Johnson's N. York Reports, 344; Holmes *v.* Remsen, 4 Johnson's Chancery Cases, 460; 20 John. Rep. 229; Milne *v.* Moreton, 6 Binney's Pennsylvania Rep. 353; Harrison

v. Sterry, 5 Cranch's Rep. Sup. Court U. S. 289; Harvey *v.* Richards, 403; Slacum *v.* Pomery, 6 Cranch, 221; Scofield *v.* Day, 20 Johnson, 102; Goodwin *v.* Jones, 3 Massachusetts Rep. 577; Grimshaw *v.* Bender, 6 Mass. Rep. 157; Van Reimsdyk *v.* Kane, 1 Gallison's Rep. 371; McCandlish *v.* Cruger, 2 Bay's S. Car. Rep. 377; Taylor *v.* Gear, Kirby's Conn. Rep. 313; Lodge *v.* Phelps, 1 John. Cases, 139; McNeil *v.* Colquhoun, 2 Hayward's N. Car. Rep. 24.' pp. 529, 530, 531.

As a specimen of the lecture we quote a passage on the subject of the gradual abolishment of the territorial jurisdiction of the barons in France, and the substitution of that of the royal courts.

'We have seen that the barons, among their other rights, possessed exclusive judicial jurisdiction in their own domains. This, like the others, was gradually abolished by the policy and increasing power of the kings; the first step in which was the enactment of that code which is known by the name of the "Establishments of St. Louis." By the wisdom which distinguished the rules of civil and criminal procedure in that code, and the principles of legal decision, (which discouraged, for example, the judicial combat;) by the adoption of a wiser jurisprudence in the royal domains; and, finally, by making it discretionary with the litigants in all civil suits, to adopt the law of the "Establishments;" St. Louis gradually wrought a change which the gentler manners, and diminished superstition of the times promoted and corroborated.

'By an ordinance in 1190, nearly a century before the Establishments of St. Louis, Philip Augustus established bailiffs or seneschals, who acted as judges for the king; and every barony, as it became reunited to the crown, was subjected to one of these officers. The vassals, therefore, whose lands depended on such reunited fief, became subject to the appellate jurisdiction of the royal court. In many cases, also, which were termed royal, a term the true extent of whose meaning was kept in studied ambiguity, the territorial court was held to be incompetent; and these encroachments were attended by two other very important ones, viz. that vassals might complain in the first instance to the king's court; and that in all cases, the royal court might take cognizance of a suit unless the defendant excepted to the jurisdiction.

'The Parliament of Paris, as we have before mentioned, was another great organ of the kingly jurisdiction. This supreme council of peers was the great judicial tribunal of the French crown, from the accession of Hugh Capet. It was originally composed of the king's great vassals, peers of those who were to be tried by it, and also of the household officers. But when the business of this court became vastly increased by the multi-

plicity of appeals, which might originally be made from any court on denial of justice, and which afterwards were much augmented by those which came from the bailiffs' courts just spoken of, the barons found neither leisure nor capacity to sit there; and St. Louis, anxious for regularity and wisdom in its decisions, introduced into it some counsellors, chiefly ecclesiastics, to act as advisers. It now became known by the name of the Parliament; and though for some time ambulatory, it sat principally at Paris during the thirteenth century.

'The character of a feudal court was soon lost in this stationary parliament: it was a regular tribunal, and not a loose aristocratic assembly. It was to hold two sittings in the year, and was composed of two prelates, two counts, thirteen clerks, and as many laymen. The nobility, however, grew weary of attendance; the bishops were dismissed to their sees; and lawyers gradually engrossed the whole direction of the tribunal. With them, however, sat the lay and spiritual peers of France, a title no longer applicable to all persons coequal in tenure under the king, but to twelve great feudatories, six of them ecclesiastical: this number, however, was augmented by successive creations. A judicial body thus constituted, was necessarily important and respectable; and it was deemed essential, at least as early as the close of the fourteenth century, that the king's edicts should be registered on its records, before they had validity as laws. This privilege was often used by that body for the public benefit; it frequently set itself in opposition to royal usurpation; and its struggles just before the commencement of the French revolution, are well known to modern history.

'Thus, then, the kings regained for the sovereignty that right of dispensing justice which, though essential to the constitution of every well regulated state, had been wrested from it by the territorial privileges of the feudal barons; privileges which, we have seen, were the growth of anarchy and barbarism. The steps of their policy were slow but certain; and received force from their augmenting resources and consequence. We have already remarked that the kings first assumed jurisdiction where the lords' courts, from some particular circumstance, could not render complete justice to the suitors. This was a plausible ground for the assumption of jurisdiction, and proved a principal source of its amplification. An appeal, too, was provided on the ground of an unjust sentence; whenever the royal prerogative was supposed to be concerned; and lastly, where the suitors had election to decline the trial by combat. But perhaps as powerful an instrument as any, in the augmentation of the king's general jurisdiction, was the dignity and superior regularity of the royal courts. Yet as the king could not decide every cause in person, the next natural step was to appoint bailiffs or seneschals, with right of

jurisdiction in different districts of the kingdom. Royal courts thus established in every quarter, the subjects would naturally resort to them; and as the administration of justice by the barons was, in the first instance, subject to several limitations, there were endless pretexts for obstructing and reviewing their proceedings. The king's supreme court, originally ambulatory, became, as we have seen, fixed as to the place, and regular in the time of its meeting. Skilful persons, also, were then selected to preside in it; and as the right of hearing appeals was its essential privilege, the final decision of all causes of importance was eventually brought into the Parliament of Paris, or the other courts constructed by the king in different provinces. To this important acquisition to the royal prerogative in the dispensation of justice, was added, as we have remarked, another not less important, viz. its legislative power. The assent of turbulent barons was no longer deemed requisite to the promulgation of a law: it was deemed sufficient that the decree was registered by the Parliament of Paris, a body which, though it stood often in the way of the violent exercise of royal power, was manifestly, from its constitution, too much under the royal control not to strengthen the power of the sovereign to a great degree.' pp. 538—541.

We have thus cursorily noticed the various topics of this volume, and can assure the student that he will find Mr. Hoffman's manner very attractive. His arrangement is generally good, his style is flowing, expansive, and lucid, and his sentences seem to have been elaborated with some care. He treats the authors whom he criticises with great candor and liberality, even when he differs from them in opinion. The work contains no marks of hasty, extempore execution, but every where bears the characters of wide reading and careful investigation; and whenever the author touches upon a subject that strictly belongs to the veritable law, as we find it in the treatises, digests, and reports, cases in illustration flow in upon him in abundance. The questions are very distinctly presented and satisfactorily discussed, with an accuracy and fulness of learning, and an ease and familiarity with the subject, which give a most commendatory earnest of the forthcoming volumes.

Art. VII.—PETERS'S REPORTS.

Reports of Cases Argued and Adjudged in the Supreme Court of the United States, January Term, 1829. By Richard Peters, *Counsellor at Law and Reporter of the Decisions of the Supreme Court of the United States. Vol. II.* Philadelphia. P. H. Nicklin & T. Johnson, 1829. pp. 735.

In a former number of our journal we gave a short notice of the first volume of Mr. Peters's Reports. Some faults in his mode of reporting were there pointed out. His second volume, which has since been published, seems to us liable to the same objections which we then advanced. As the mode of reporting, adopted in these volumes, not only renders them very inconvenient to readers, but is also likely to diminish very seriously the value and influence of the decisions of the highest tribunal in the country, we feel it a duty to point out distinctly what appears to us exceptionable in his work. This we shall do the more readily, as the greatest faults of Mr. Peters as a reporter seem to arise, in some respects, from what we consider a false theory on the subject of reporting, and in others from carelessness, and in either case may be corrected.

The labors of reporter, we readily acknowledge, are arduous. To take notes of the speeches of counsel, which are often ill-digested and illogical, minuting down all the authorities which are cited; and afterwards from these notes to give a brief and lucid sketch of the argument, verifying the citations by a reference to books; from a voluminous mass of papers to present a systematic and exact statement of the case, in which without any redundancy nothing shall be omitted; and, finally, to prepare the summary or abstract, which shall present the material points which the court have decided or expressed an opinion upon, the very essence of the case,—these altogether require an amount of patience, attention, skill, and legal science, which are probably not generally realized. We should, therefore, readily pass over the little imperfections of a reporter in consideration of the difficulty and extent of his labors, and should not again call the attention of our readers to Mr. Peters's Reports, if we did not believe the defects in them to be essential and glaring.

In our review of the first volume of these reports, we men-

tioned as a fault that the statements of the case were often given twice over, first before the argument of the counsel, and again in the opinion of the judge. This is done in several instances in the present volume. The statement given by the reporter is often in very nearly the same words as that presented by the judge. As instances of this error we mention, *Bank of the U. States* v. *Corcoran*, p. 121; *Van Ness* v. *Pacard*, p. 137; *Leroy* v. *Johnson*, p. 186; *American Fur Company* v. *The United States*, p. 358; *Bank of the United States* v. *Owens*, p. 527; *Beatty* v. *Kurtz*, p. 566; *English* v. *Foxall*, p. 595. Mr. Peters, it is true, has the sanction of other reporters in the course which he has adopted. But we must persist in considering it as very slovenly to use these vain repetitions, and not tending in any degree to render the cases clear.

Mr. Peters, in this as in the first volume, sometimes, instead of presenting any statement of the case before the argument of the counsel, refers the reader for it to the opinion of the court. This is even worse than giving the statement twice over, as having to turn over the leaves to find the facts or pleadings in the judge's opinion, is inconvenient and very irritating to the reader. The only correct course, it seems to us, in every case in which the argument is given, is to introduce it by stating the case, and to omit the statement in the opinion as far as practicable. This subject may perhaps seem of but little importance, but nothing should be neglected which serves to bring the case easily and expeditiously into the reader's mind.

The statements of cases in this volume are not liable to any great objection, though, perhaps, they are sometimes a little more diffuse than is desirable. The arguments of counsel, too, are usually well prepared, presenting their reasonings and illustrations with sufficient clearness and fulness.

The defects which we have already noticed are comparatively unimportant. It is in the abstracts or summaries of the cases that we find most cause for blame. As the proper preparation of these abstracts is at once the most difficult and the most important of the reporter's duties, we shall be excused for giving it a full consideration.

From an examination of these abstracts we should infer that, instead of endeavoring, from a thorough study of the case, to ascertain the points in controversy, and to present a digest of the substance of the decision, all that the reporter does, is to

read over the opinion of the court, and then extract from it a number of sentences or paragraphs, on what principle of selection it is difficult to say, and place them at the head of the case. These extracts are usually very little changed from the words of the court, and therefore have some connexion with the matters actually in controversy. This system of forming abstracts, produces very much such an effect, as would be made by reducing a map, plan, or figure, by cutting out pieces here and there, and then putting them together like the Chinese puzzle, instead of projecting the whole map with all its proportions upon a smaller scale. The reader finds in the abstract, arguments, observations, and illustrations of the court, learns something of the path which they have been pursuing, but is left entirely at a loss as to the conclusions at which they arrive. After studying a page or two of fine type, his mind is in a painful state of uncertainty as to the points actually decided by the court, and can only be relieved by examining the body of the decision.

In some instances in the reporter's resolute determination to introduce the *ipsissima verba* of the court into the abstract, he uses forms of expression which, however suitable for a court, appear very strange in the mouth of a reporter. Thus we find in one abstract, the reporter asserting, 'we should feel not much difficulty in saying,' as if he himself was the oracle of the law. This is, perhaps, merely clumsiness in point of style. But in other instances his fondness for the words of the court, leads him to set down general expressions falling from the judges as established principles, without limiting them to the circumstances of the case under consideration, even where such a limitation was obviously intended by the court. This giving too general an effect to the language of judges, is a frequent error among reporters, but Mr. Peters's peculiar system renders him remarkably prone to it.

Thus far we have only referred to cases in which, though the points decided by the court are not stated in the abstract, some allusion or reference is made to them; but it sometimes happens that nothing is said in the abstract which would induce the most attentive reader to conjecture that the points actually decided were presented by the case. It seems difficult to account for these omissions. It may perhaps be contended that the points which are omitted in the abstract, are of no importance, being merely an affirmation of principles of law

which before were perfectly well settled. It does not seem to us that the omitted points are always of this character. But if they were, the reporter has no discretion to admit them into, or reject them from his summary. In every case reported it is his duty in the abstract to present every point which the court have thought sufficiently important to decide. The reporter ought not to shrink, as Mr. Peters sometimes appears to do, from the labor of presenting the substance of a decision which depends on complicated circumstances.

In order to expose the absurd system on which the abstracts in this volume are prepared, we shall, at the risk of fatiguing our readers a little, examine a few of them.

In *Van Ness* v. *Pacard*, p. 137, the decision may be stated as follows. A building two stories high in front, with a cellar of stone or brick, and a brick chimney resting on the stone or brick foundation, and a shed of one story, were erected by a lessee during his term on the land leased to him. These buildings were erected with a view to carry on his business of a dairyman, and for the residence of his family and servants engaged in his said business. The cellar, in which was a spring, was used as a milk cellar; and the utensils of his said business were kept, scalded, washed, and used in the upper part of the house, in which his family resided. The lessee was also a carpenter, and had tools and two apprentices in the house, and a work bench out of doors, and worked in the house at his trade of a carpenter. *Held*, that the house did not become part of the freehold, and might be rightfully removed by the lessee during the continuance of his lease.—In an action on the case by a lessor against his lessee for removing buildings erected by him during the continuance of the lease, evidence is admissible to show a usage or custom of the place in which the land lies for tenants to make such removals of buildings during their term.—Another point of no great importance is taken notice of in the last paragraph of Mr. Peters's abstract, which follows. We have numbered the paragraphs for the convenience of referring to them. The numbers in brackets at the end of each paragraph are given by the reporter to show the page of the judge's opinion from which he extracted it.

1. 'Action on the case against the defendant for waste, committed by him while tenant of the plaintiff, the owner of the reversionary interest, by pulling down and removing from the demised premises, a dwelling-house erected thereon, and attached

to the freehold. The question raised in the case was, what fixtures erected by the tenant during his term are movable by him.

2. 'The general rule of the common law undoubtedly is, that whatever is once annexed to the freehold becomes part of it, and cannot be afterwards removed, except by him who is entitled to the inheritance. This rule, however, never was inflexible, and without exceptions. It was construed most strictly between executor and heir, in favor of the latter; and more liberally between tenant for life and in tail, and remainderman or reversioner, in favor of the former; and tenant, in favor of the tenant. A more extensive exception to the rule has been of fixtures erected for the purposes of trade. Fixtures which were erected to carry on trade and manufactures, were from an early period of the law allowed to be removed by the tenant, during his term; and were deemed personalty for many other purposes. [143]
3. 'The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright. But they brought with them, and adopted only that portion which was applicable to their situation. [144]
4. 'It might deserve consideration, whether, if the rule of the common law of England which prohibits the removal of fixtures erected by the tenant for agricultural purposes, were not previously adopted in a state by some authoritative practice or adjudication; it ought to be assumed by this Court, as a part of the jurisprudence of such state, upon the mere footing of its existence in the common law. [145]
5. 'The question whether fixtures erected for the purposes of trade, are or are not removable by the tenant, does not depend upon the form or size of the building; whether it has a brick foundation or not, or is one or two stories high; or has a brick or other chimney. The sole question is, whether it is designed for the purpose of trade or not. [146]
6. 'If the house were built principally for a dwelling-house for the family, independently of carrying on a trade, then it would doubtless be deemed a fixture falling under the general rule, and irremovable. But if the residence of the family were merely an accessary for the more beneficial exercise of the trade, and with a view to superior accommodation in this particular, then it is within the exception. [147]
7. 'Every demise between landlord and tenant in respect to matters in which the parties are silent, may be fairly open to explanation by the general usage and custom of the country, or of the district where the land lies. Every person, under

such circumstances, is supposed to be conusant of this custom, and to contract with a tacit reference to it. [148]

8. 'A court cannot be required to give an instruction to the jury as to the relation, right, and credibility of the testimony adduced by the parties in a cause. [149]' p. 137.

We have given the whole of this long summary, by no means one of the longest; as it gives not an unfavorable view of the mode in which the abstracts in this volume are made, and will enable our readers to judge of the justice of our animadversions. In all this voluminous mass of matter, it is obvious that the reporter gives neither of the main points on which the case hinged. The words of the court are given over and over again; the reader may now and then think he is approaching to some conclusion, which is ever flying from him like an *ignis fatuus*. He will perhaps conjecture that the questions raised related to the removal of fixtures, and that is all that he can find out without consulting the body of the case. The facts on which the case depended, do not appear, nor the decision of the court which rested on those facts. Only two of the paragraphs, the seventh and eighth, approach, in point of form, to the proper mode of stating a decision. And the seventh only states a general principle, and not what was more necessary, the application of that principle to the particular circumstances of the case. The eighth paragraph contains a frightful error of the press, the expression 'relative weight and credibility,' used by Judge Story, being transformed into 'relation, right, and credibility.'

The case of *Townsley* v. *Sumrall*, p. 170, presents a decision of great interest to the commercial community, to wit, that where a bill of exchange drawn in one of the states of the Union, is payable in another, a notarial protest is evidence of the presentment and dishonor of the bill. The reporter does not in his summary give this point, but only the following extracts from the opinion of Judge *Story*.

'It is admitted, that in respect to foreign bills of exchange the notarial certificate of protest is of itself sufficient proof of the dishonor of a bill without any auxiliary evidence. [179]

'It is not disputed, that by the general custom of merchants in the United States, bills of exchange drawn in one state on another state, are, if dishonored, protested by a notary; and the production of such protest is the customary document of the dishonor. [180]' p. 170.

These expressions of the judge, though very properly introduced by him in stating the grounds of his decision, are yet not the decision itself, not what we seek in the summary. Nor could one even conjecture with great confidence from these paragraphs what was the question in the case or what the decision of the court was. For there would have been no inconsistency in these expressions with a directly opposite decision; as the judge after these two sentences might have said, 'But notwithstanding all this we feel ourselves constrained, by the weight of authority, to decide that a protest cannot be evidence in a court of justice.'

The same summary, which comprises a whole page of disjointed observations, torn rudely from the judge's opinion, yet fails to take any sort of notice of several points actually decided by the court. It is needless for us to repeat them here, we only refer the reader to the case itself.

The case of *Buckner* v. *Finley*, p. 586, turned on the construction of a clause in the judiciary act. This statute (St. 1789, c. 20) in the eleventh section provides that no District or Circuit Court shall 'have cognizance of any suit to recover the contents of any promissory note or other *chose in action*, in favor of an assignee; unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of *foreign bills of exchange*.' The action was brought in the Circuit Court for Maryland district by a citizen of New York, as the endorsee of a bill of exchange, against the defendants, citizens of Maryland, as drawers. The bill was drawn at Baltimore, and payable at New Orleans; and the payee was also a citizen of Maryland. It was contended by the defendants that the Circuit Court had no jurisdiction of the case as the original parties to the bill, the drawers and the payee, were all citizens of the same state. But the Supreme Court decided that the bill was a *foreign bill* within the meaning of the act, and therefore that the United States Court had jurisdiction of the action. The following is the whole of Mr. Peters's summary of this decision, consisting of two extracts from the opinion of Judge *Washington*.

'Bills of exchange drawn in one state of the union, on persons living in another state, partake of the character of foreign bills, and ought to be so treated in the courts of the United States.

'For all national purposes embraced by the federal constitution,

the states and the citizens thereof are one, united under the same sovereign authority, and governed by the same laws. In all other respects, the states are necessarily foreign and independent of each other. [590]' p. 586.

This summary is at once redundant and defective. The second paragraph is a mere general observation, which should not have been introduced into the abstract. But notwithstanding this unnecessary matter, the very point decided by the court is entirely neglected. No reader could suspect from the summary that a question of jurisdiction had been decided. The first paragraph, which seems more nearly connected with the point in controversy, than the other, and which contains the statement of a principle properly introduced by the judge in his opinion as introductory to his conclusion, becomes in the hands of the reporter a feeble and barren generalization.

The first paragraph of the summary in *Leroy* v. *Johnson*, p. 186, is as follows.

'In an action originally commenced against A and B as partners, upon an alleged engagement by the firm, and where A who was not found or served with process, was offered as a witness in favor of B, having been released by B, the Court said, "It is to be premised that the only ground upon which the objection can be rested is the supposed interest of the witness in the event of the cause; since the suit having regularly abated as to him by the return that he was "no inhabitant," he was no more a party to it, than he would have been had his name been altogether omitted in the declaration. As to the objection upon the score of interest, it is sufficient to remark, that it was manifestly hostile to the party in whose favor he testified, and who offered it in evidence; since the plaintiffs' recovery against the defendant, and satisfaction from him, would be a bar to their action against the witness; and the release of A protected him against any action which A might bring against him for contribution or otherwise." [194]

Here the reporter favors the reader with the reasoning of Judge Washington, which is, no doubt, sound and well expressed, however out of place in the abstract; but he has forgotten to give the decision of the court which rested on this reasoning, viz. that A was a competent witness, the only thing which was important to be stated beyond the circumstances under which the witness was offered.

We could very easily multiply the number of our citations. Indeed there is scarcely a single abstract in the volume which

states the points in the case definitely and tersely, and which is not open to serious objections.

One of the paragraphs in the summary of *Boyce* v. *Anderson*, p. 150, is as follows.

'The ancient rule of the law of carriers, that the carrier is liable only for ordinary neglect, does not apply to the conveyance of slaves.'

This is directly the reverse of the opinion expressed by the court. C. J. *Marshall*, in giving the opinion, says, 'But if the court is right in supposing that the strict rule introduced for general commercial objects, does not apply to the conveyance of slaves, the ancient rule "that the carrier is liable only for ordinary neglect, still applies to them."'

Art. VIII.—NEW HAMPSHIRE CASES.

Cases Argued and Determined in the Superior Court of Judicature of the state of New Hampshire. Vol. I. Part I. Containing Cases from January to November, 1827. Chester. Currier, French, and Brown. 1829. p. 200.

This is a collection of forty-two cases, ably argued by the counsel, elaborately and learnedly investigated by the court, and skilfully reported. We have rarely taken up a volume of the kind in which the task of the reporter is executed in a better style. The abstracts, particularly, are remarkably well made. Though we have not followed them exactly in our own, yet we have not varied from them, with the expectation of making them better, but partly for conciseness, and partly to adapt them to the object of our work, by taking only the propositions of a general character. Only one of the abstracts struck us as defective, and of the defects of this we have some doubt. It is this,

'When a contract not to sue, is to be construed as a release.' *Parker* v. *Holmes*. p. 97.

Our abstract of the same case, to save the reader the trou-

ble of turning to it, under the head of 'Agreement not to sue,' is as follows.

'Thomas Holmes makes a promissory note to French, and secures payment by a mortgage. He afterwards sells the equity of redemption of the mortgaged premises, which, after some intermediate conveyances, is conveyed to French by Jonathan Holmes; with whom French at the same time agrees to look exclusively to the mortgaged premises for the payment of Thomas Holmes's note. This is not a release of the note, but, at the most, only gives Jonathan H. a right of action against French, in case of a suit being brought upon Thomas H's note.'

The objection to the reporter's abstract, is, that it is too general, it gives the reader too imperfect a notion of what the case contains. The case does not profess to be a comprehensive disquisition on the general question, when an agreement not to sue will amount to a release. Upon this general subject it only gives the received doctrines, and assumes that if this agreement had been made with Thomas Holmes himself, the maker of the note, it would not amount to a release of the note; *a fortiori*, such an agreement with a third party will not have that effect. The point is thus very happily presented by the Chief Justice in giving the opinion of the court, and the decision reduced to a plain syllogism. But this point cannot easily be presented, without stating the general facts of the case, as we have done in our abstract; at least we do not think of any shorter way of presenting it. The objection to our abstract is accordingly its length. Where abstracts are arranged in an index, the general head, as 'Agreement not to sue,' 'Release,' &c. gives the leading subject of all the abstracts contained under it. But at the beginning of the cases in the volume of reports, it may be well, as is often done in similar instances, to make two abstracts, one such as that of the reporter in this case, presenting the general subject of the decision, the other including the facts and inference. We will not, however, go into any consideration of the subject, as we have considered it particularly in our previous numbers. Our only purpose here is to remark, that this abstract is the only one in this collection of cases, respecting the accuracy and sufficiency of which any doubt occurred to us in looking them over.

Many of the questions discussed in these forty-two cases

are of general interest, as will appear from our abstracts of them. The volume opens with the discussion of a point of evidence in an action for covenant broken, brought upon a deed dated Dec. 10th, 1813, of a piece of land in the town of Boscawen, with warranty against all incumbrances, and the question was, whether the grantor had, in effect, granted the public a right of way over the premises, by acquiescing in the use of such way from 1796 to the time of the conveyance, in 1813. We quote the opinion of the court, as likely to be interesting to many of our readers who will not probably have access to these reports.

'"There is" says Lord Mansfield, "a great difference between length of time which operates as a bar to a claim, and that which is used only by way of evidence. A jury is concluded by length of time that operates as a bar, as where the statute of limitations is pleaded in bar to a debt; though the jury is satisfied that the debt is due and unpaid, it is still a bar. So in the case of prescription, if it be time out of mind, a jury is bound to conclude the right from that prescription, if there could be a legal commencement of the right. But any written evidence showing that there was a time when the prescription did not exist, is an answer to a claim founded on prescription. But length of time used merely by way of evidence may be left to the consideration of the jury, to be credited or not, and to draw their inference one way or the other according to circumstances." *Cowper* 108.

'Length of time, when it amounts to a bar, is always a fixed period. In England, the time of memory is fixed to the commencement of the reign of Richard the First, which was the 7th of July, 1189. Every thing done before that time is said to be before the time of memory, and every thing done since is within the time of memory. If a prescription can be shown not to have existed at any time since the 7th of July, 1189, it cannot be supported. 2 Rolle's Ab. 269.

'So both in England and this country, when length of time is made a bar to an action, real or personal, it is a fixed period.

'As a writ of right, which is the highest remedy known to the law for the recovery of land, is in England limited to sixty years, it has been thought there, that the time of memory in relation to prescriptions should be by parity of reason limited to the same period; because prescriptive rights are in their nature inferior to land. 2 Rolle's Ab. 260. And in this state, as all the remedies in common use to recover lands are in general barred by an uninterrupted adverse possession, for twenty years, it would seem that, upon principle, an uninterrupted and constant use of a way over land for twenty years should be conclusive evidence of a

right. But the law is settled to be otherwise. Such a possession and use is evidence of a right, but not conclusive evidence.

'In the case now before us, it is not disputed, that, if the way had been constantly used with the knowledge of the defendant for twenty years, it would have been evidence of a dedication of it to the use of the public. But it is contended that no use of the way for any period short of twenty years is evidence of such dedication. It seems to us that it will be difficult to maintain this ground upon principle. For if it was expedient and proper to make by statute the peaceable adverse possession of land for twenty years conclusive evidence of a right, how it can be that an uninterrupted use of an easement for nineteen years is no evidence of a right, is not very easily conceived. But this is a question to be settled by authority.

'It is said to be a rule of law in England, that if a man build a bridge and it becomes useful to the county in general, the county shall repair it. 5 Burr. 2597; 2 W. Bl. 685; 2 East, 356, *note;* 353, *note;* and 342 *The King* v. *The West Riding Yorkshire;* 1 Salk. 359; 12 East, 192; 7 East, 588; 5 Taunt. 285; 2 Chitty's C. L. 589.

'And we have decided that when individuals erect a bridge and dedicate it to the public, as soon as it has been used long enough to show its public utility, the repair of it becomes a charge upon the public. It is not necessary it should be used twenty years to become so, but it depends upon the inquiry whether it be of public utility. 2 N. H. Rep. 513, *The State* v. *Campton.*

'It must not be supposed however, that individuals can impose a burthen of this kind upon towns, by building slight bridges over streams in any place where they may choose. Such attempts may be indicted and punished as nuisances. 2 East, 348. It is when they have been used long enough to show their utility without being treated as nuisances, that they become a charge upon the town. 1 Pick. 188.

'And it has been held in England, that a private individual who builds a street or otherwise opens a thoroughfare to the public, without erecting any bar to preserve his right of stoppage, or even throws open a passage without any visible mark of exclusion or prohibition to persons using it, will, after the expiration of six years, be considered as having dedicated it to the public. 2 Chitty's C. L. 566; 11 East, 375, *note;* 1 Camp. 260.

'Some doubt has since been expressed whether a dedication could be presumed in so short a time. 5 Taunt. 124, *Woodyer* v. *Hadden.* And it is very clear, that under all circumstances it could not be presumed in so short a time. It was held in the case last cited, that after nineteen years, the street could not, under the circumstances, be considered as dedicated to the public for all purposes. Much depends upon the circumstances. When

an individual deliberately throws open a road to the public, and permits it to be travelled by all without interruption, we have no doubt that in much less than twenty years these facts might be left to a jury as evidence of a dedication.

'Lord Ellenborough says, 6 East, 215, "I take it that twenty years' exclusive enjoyment of the water in any particular manner, affords a conclusive presumption of right in the party so enjoying it, derived from grant or act of parliament. But less than twenty years' enjoyment may or may not afford such presumption, according as it is attended with circumstances to support or rebut the right." 1 Camp. 463, *Dalston* v. *Bensted.*

'It has been decided that an uninterrupted use of a private way for twenty years might be left to a jury as evidence of a grant. 3 East, 294, *Campbell* v. *Wilson*; 2 Pick. 466, *Hill* v. *Crosby;* 14 Mass. Rep. 49, *Gayetty* v. *Bethune;* 5 B. & A. 454, *Wood* v. *Veal.*

'So the use of a market for twenty-three years was held to be competent evidence to be left to a jury to prove a grant. 1 Bos. & Puller, 400, *Holcroft* v. *Hul,* which is explained in 3 East, 298; 2 Saund. 175, *note* 2.

'Payment of a bond may be presumed after eighteen or nineteen years under some circumstances. 1 D. & E. 272; 10 Johns. 381.

'So a person who has been absent seven years and nothing heard of him for that time, may be presumed, under some circumstances, to be dead. Phillipps' Ev. 152.

'A regular usage for twenty years unexplained and uncontradicted, is sufficient to warrant a jury in finding the existence of an immemorial custom. 2 B. & C. 54, *The King* v. *Joliffe.*

'Whoever considers for a moment, attentively, the nature of lapse of time, as evidence of a fact, will perceive the difficulty and absurdity of attempting to fix, in all cases, a particular length of time which may be considered as evidence, and any less time as affording no proof. For it is very clear that in many cases, the strength of the evidence depends much more upon the attending circumstances than on the length of the time. See Phillipps' Ev. 114, 124.

'This is well illustrated by a case stated by Phillipps, 123. If a tenant for years or for life gives a license to another to enjoy an easement on his land for above twenty years without intermission, this will not affect the person in the reversion or remainder; but on the determination of the particular estate he may dispute the right to the easement, and the length of possession will not be evidence against him to presume a grant, unless it can be shown that he acquiesced.

'Whether the lapse of time is, in any particular case under the circumstances, proper to be submitted to a jury as evidence of a

fact, is a question of law to be settled by the court, and must to a certain extent depend upon the circumstances.

'And in the case now before us we are of opinion that the defendant's acquiescence in the laying out, making, and use of the road for seventeen years without any objection, was, under the circumstances, competent evidence to be left to a jury as proof that he had dedicated the land to the use of the public without any compensation. It is not an uncommon thing for the owner to give the land for the sake of having a highway. And we have no doubt that it might have been left with propriety to the jury to presume from the defendant's long acquiescence that he received a due satisfaction. We of course think that there was no misdirection to the jury in this respect.

'If the plaintiff had relied upon the record as evidence of a highway, it might have been necessary to consider the effect of the mistake in the description of the road in the record. But that is now unnecessary. Because it is clearly the road which has been actually made and travelled, and in which the defendant has acquiesced, that has become a highway. *Judgment on the verdict.*' pp. 11—16.

The opinion of the court in this case, and indeed in all the others, in which the judge's name is mentioned, is given by Chief Justice Richardson. The method is generally very clear, and the logic close, without waste of words. The court usually proceeds directly to the matter in hand, without any useless introduction or ambages and generalities, of which our American reports afford too many examples. It is a circumstance very much in commendation of this publication that the following only three useless lines, struck us as an exception to the compact neatness which generally prevails in these opinions. The lines are,

'We have attentively considered the motion which has been made in this case, and shall now proceed to express the opinion we have formed.'

We presume these reports to be made by Chief Justice Richardson, and regret that they do not come out in his name, for the title is certainly a very long one to cite. The name 'New Hampshire Reports,' is already appropriated; that of 'New Hampshire Cases,' is, we believe, not yet made use of. But the volume will, by and by, no doubt assume the name of the reporter, and to save the trouble and confusion occasioned by a change, it would be more convenient to call it at once Richardson's Reports.

In the case of Pike *v.* Bayley, cited under the head of Pleading in our abstract, the court decide a plea of non-tenure in abatement, to be bad on demurrer, because it does not conclude more formally. This seems to be adhering to the established forms with great strictness.

We observe one omission in this volume; it does not give the names of the judges of the court whose decisions are reported. They will probably be given when the rest of the volume shall be published. But it is satisfactory to know in each case what judges were present and concurred in the decision, which is done either by giving the names of the judges in the beginning of the volume, and noting the absence of any one at any particular term, or in any particular case, as is done in some of the old reports, or by giving the names of the judges present at the beginning of the session in each county.

Art. IX.—PROVINCIAL AND COLONIAL LAWS.

The Force of Provincial and Colonial Laws and Customs since the Establishment of Independence.

Nothing can be more important to a free people, desiring and professing to be governed by fixed laws, than to know with certainty what provisions have the force and effect of binding laws. In many countries, uncertainties upon this subject have existed to such a degree as to render the rights of property in a great measure insecure. In many places customs prevail, having to a greater or less degree the force of law. In France, before the adoption of the Code, different customs prevailed in different provinces and districts, so that very different systems of law were to be administered by the same tribunals, and over people yielding obedience to one and the same government. Another class of inconveniences, though of a somewhat similar character, arises where there is an uncertainty as to the authority of different acts, having to an extent the force of law, such as the decrees, rescripts, ordinances, and other acts, emanating from different authorities, and uncertain as to their force, their extent, and duration. Thus

the imperfection of the laws of the Roman empire arising from these causes, previous to the time of Justinian, was one of the motives which led to the formation of the Digests and Institutes during his reign, out of the multiform and vast materials supplied by the twelve tables, plebiscita, senatus-consulta, prætorian edicts, imperial decrees, and responses of the jurisconsults.

Happily in this country we are in a good degree exempt from the doubts and difficulties arising from these causes; and although those of another character, arising from the number of legislative bodies in the United States, and the rapidity with which they move, and the consequent multiplicity of legal enactments, render it difficult for the acutest practitioner, without extreme labor and research, to keep pace with them; yet such is the character of all our constitutions, that there is now no difficulty in determining whether any particular act emanates from a legitimate authority. All these constitutions provide particularly the manner in which the legislative power shall be constituted and exercised. No act, unless it have the sanction of the regularly constituted legislative power, and be framed, authenticated, and promulgated in the course required by the constitution, can require the obedience, regulate the conduct, or affect the rights of the citizen. No proclamations, orders, ordinances, or similar acts, emanating from executive or judicial authorities, can have the force of law. In some few instances, indeed, in the practice of the United States, an authority has been given to the President to enforce or suspend, particular legislative provisions, at his discretion; these, however, can hardly be considered exceptions to the general rule, inasmuch as the law derives its full force and effect, when in operation, from the authority and sentence of the legislature, regularly exercised, and nothing but the time, either of its commencement or termination, is left to be decided by the executive. And it is to be hoped that this limited power will be delegated sparingly, and only in cases of urgency, and upon high considerations of policy and expediency, to enable the President to negotiate more effectually with foreign powers. This power should be given sparingly, lest the people should gradually become habituated to overlook the distinction between the constitutional and the delegated powers of the executive, and to attribute a higher degree of weight and authority to executive acts, than are warranted by the constitution.

But although there may be little difficulty, with proper inquiry and research, to ascertain among modern acts, what have or have not the force of law, and as such demand the obedience, and affect the rights of the people; yet there is a real difficulty in determining, among those which have been transmitted to us from our ancestors, those that are entitled to this character. This is a most important subject, and one well deserving the attention, particularly of the older American jurists, still remaining, whose experience and traditionary knowledge extend to a period antecedent to, or coeval with the revolution. No doubt, many customs, arising from our peculiar situation and the nature of our early institutions, many alterations and modifications of the English common law, were adopted in all the colonies, which are essential to the support and maintenance of ancient titles, but of which there is no record or evidence, except in the custom and practice of courts of justice, and the experience and memory of those most conversant with that practice. Part of these have been embodied and preserved in the decisions of courts, since regular reports have been published; and one of the most valuable purposes of the earlier reports in the several states, was, that they served as a repository for the permanent preservation of usages and principles of this description.

Hoping that this subject will not be lost sight of, by those who are competent to throw light upon it, we are now desirous of calling the attention of the juridical reader to a single branch of the subject, and to inquire, or rather to encourage others to inquire, whether the ordinances passed under the first colonial government of Massachusetts, are to be regarded as usages, or rather as evidence of ancient usage, to be considered and applied in expounding ancient laws, and affecting titles so far only as they may be considered applicable and reasonable, and having no other force or effect than customs, generally acquiesced in; or whether they are to be considered as having the force and effect of statute laws, with all their qualifications, limitations, and provisions, and to be expounded like all other statute laws, according to the intent and meaning of the legislators, to be ascertained by the language used, and the subject matter to which it is applied.

One of the most important of these ordinances, is that of 1641, regulating the rights of persons holding lands bounded upon the salt water, or, in other words, the right to flats lying

between high and low water mark. It must be obvious to the most superficial inquirer, that of however little importance this species of property may have been, in early times, when there was but little commerce and navigation, the value and importance of flats, for the erection of wharves, docks, and warehouses, especially in ports and commercial towns, are likely to render all questions relative to the title to this kind of property peculiarly interesting, to the landholder and the legal practitioner. This ordinance provides, 'that in all creeks, coves, and other places about and upon salt water, where the sea ebbs and flows, the proprietor of the land adjoining shall have propriety to the low water mark, where the sea doth not ebb above a hundred rods, and not more whensoever it ebbs further; provided that such proprietor shall not by this liberty have power to stop or hinder the passage of boats or other vessels, in or through any sea, creeks, or coves, to other men's houses or lands.'

In the case of Storer *v.* Freeman in 6 Mass. Rep. 438, Mr. Chief Justice Parsons having occasion to cite this ordinance, remarks, that 'this ordinance was annulled with the charter by the authority of which it was made; but from that time to the present, an usage has prevailed, which now has force as our common law, that the owner of lands bounded on the sea or salt water, shall hold to low water mark,' &c., according to the terms and restrictions of the ordinance.

It is certainly of importance to determine whether this observation be well founded; because if all the colonial laws are to be considered as abrogated, with the repeal of the charter, and now only stand as proof of ancient usage, stripped of the authority of law, then it is obvious that such proof may be rebutted by showing a change or discontinuance of such usage, which would wholly destroy and take away the force and effect of the ordinances, as laws. Whereas, if they are to be considered as statute enactments, having the force of law, they may be relied upon, as such, until altered or repealed by the legislature. It is indeed a startling proposition, that when a charter is made for the government of a numerous, civilized, wealthy, and free community, with full powers to make laws, provide for the administration of justice, and perform all the functions of government, if such charter is annulled, all the laws made during its existence are deemed also to be annulled with it. It would certainly seem not to be well founded, if it were held

to extend to the annulling of vested rights; and it is difficult to perceive any limit short of that extent, at which it should stop; for, if those rights depend upon such laws, for their maintenance and support, the annulling of such laws would seem to destroy the rights depending upon them. Such, it is believed, has not been the distinction when charters of this description have been repealed or annulled.

But without relying further upon such implication or construction, arising from considerations of reason and expediency, our object is to show, from direct and unequivocal authority, that these ordinances are in force, as laws.

By the 6th art. 6th chap. of the constitution of Massachusetts, it is provided, that 'all the laws which have heretofore been adopted, used, and approved, in the province, colony, or state of Massachusetts Bay, and usually practised on in the courts of law, shall still remain and be in full force, until altered or repealed by the legislature.'

Probably this constitutional provision alone would not be construed to revive and continue in force the laws of the colony, if they had been annulled previously. The word '*remain*' seems to imply that the purpose was not to revive laws which had been annulled, but simply to provide that they should remain, as they had continued, up to the time of the revolution and change of government, thereby effected. It may fairly be inferred, however, that the makers of that constitution considered and understood that the colonial laws as well as the provincial, were equally in force. That they were right in this belief, we think will appear by a reference to the early province laws.

In the very first act passed under the charter of William and Mary, in 1692, it was enacted that all the local laws made by the governor and company of the Massachusetts Bay, and by the government of New Plymouth, not repugnant to the laws of England, nor inconsistent with the constitution and settlement established by that charter, should remain and continue in force in the respective colonies, for a short time therein mentioned, except in cases where other provision should be made by the legislature thereby constituted. By another act, passed the same year, before the expiration of the former, further provision was made for continuing the said act in force, to all intents and purposes, until the legislature should take further order. It seems, therefore, that by force of these two

legislative acts, all the previous laws of the colony were continued in force with all their limitations and provisions as statutes, throughout the province of Massachusetts, excepting that part which had before constituted the colony of Plymouth. If so, these laws were adopted by the constitution, and must be of the same force and effect as all the other statutes of the Commonwealth, in that part of it at least which had previously constituted the colony of the Massachusetts Bay.

To render this distinction more intelligible to those who are not familiarly acquainted with the early history of these colonies, it may be proper to say, that the province of Massachusetts Bay, as constituted by the new charter of William and Mary, in 1692, was composed of the old colony of Massachusetts Bay, the old colony of Plymouth, and the whole of the territory now composing the state of Maine. Until that time, different parts of Maine had, at different times, been subject to different governments, extremely changeable and temporary. Parts of it were claimed and at times governed by the French, by the colony of Plymouth, by officers and magistrates, claiming under different English grants and charters, and parts of it by the government of the colony of Massachusetts. But the authority of Massachusetts, it is believed, was extended over a small part only of the whole territory, and that temporarily and irregularly, until it was fixed by the charter of 1692, which at the same time put an end to the colonial governments of Plymouth and Massachusetts Bay, and embraced the whole in one regular and well organized government.

Whether any distinction has ever been made in practice, in regard to the colony ordinances, between Plymouth and Maine on the one side, and old Massachusetts on the other, or whether any similar regulations were adopted in those colonies, are questions respecting which, we believe, there has been no judicial consideration, nor are we aware that they have come under discussion. It seems quite clear, that as statutes of this colony they could have no operation in Maine or in the old colony of Plymouth, because these colonies were not within the territorial jurisdiction of Massachusetts, at the time they were passed, nor were they extended to these colonies by the early provincial acts above cited. If these ordinances, therefore, are deemed to have the force of law in Maine and the Old Colony, it must be on the ground of their being evidence of ancient and continued usage, or as a reasonable extension and

modification of the common law, adapted to the habits, wants, and institutions of the country. It is remarkable that the case above cited arose in Maine, where the colony ordinance of Massachusetts Bay was cited, without any notice of the distinctions here suggested. The question may be of some interest in the maritime counties of Plymouth, Bristol, and Barnstable, especially in its bearing upon questions of title to lands, bounded by the sea.

In the above remarks upon a *dictum* of Chief Justice Parsons, we beg to express an entire and profound respect for the keen sagacity and sound learning of that eminent jurist. No person was probably more thoroughly versed in the early history, laws, institutions, manners, and local usages of the early settlers of New England; and the public are deeply indebted to him for much that has been preserved on these subjects, in the reports of his judicial decisions. But precisely in proportion to the respect and authority due to the observations of eminent men, is the importance of bringing such observations into public notice, and subjecting them to the test of public discussion; because in the same proportion, even an occasional inaccuracy from such a source must tend to mislead.

DIGEST OF RECENT DECISIONS.

This number contains a digest of the principal cases in
PETERS'S REPORTS, Vol. II.
NEW HAMPSHIRE CASES, Vol. I. Part 1.

ABATEMENT.

Pending the review of an action, in which a judgment had been recovered as damages for malicious prosecution, the defendant in the original action, who was plaintiff in review, dies. His administrator cannot become a party to the review. *Fernald* v. *Ladd*, 1 N. H. Cas. 145.

See PLEADING, 2.

ACTION.

A note not negotiable is made payable to W. and by him assigned to M. before it is due, for a valuable consideration. After it is due, the maker orally promises the assignee to pay him the note. The assignee may maintain an action in his own name. *Wiggin* v. *Damrell*, 1 N. H. Cas. 69.

AGENT. See EVIDENCE, 6.

AGREEMENT NOT TO SUE.

Thomas Holmes makes a note for $ 772 to French, and secures payment of it by a mortgage. He afterwards sells the equity of redemption, which after some intermediate conveyances, is conveyed to French by Jonathan Holmes, with whom French at the same time agrees to look exclusively to the mortgaged premises for the payment of Thomas Holmes's note of $ 772. This is not a release of that note, but at the most only gives Jonathan H. a right of action against French, in case of a suit being brought upon Thomas H's. note. *Parker* v. *Holmes*, 1 N. H. Cas. 97.

AMENDMENT.

Where a judgment was entered upon wrong count, leave was given, ten years afterwards, to amend the record, saving the rights acquired by third persons under the judgment. *Chamberlain* v. *Crane*, 1 N. H. Cas. 115.

See PRACTICE, 1.

ASSIGNMENT.

Where an assignment for the benefit of creditors is fraudulent in

law, it is held to be the law in Massachusetts, that the assignees are entitled to retain the property assigned, to discharge their own *bona fide* debts; and that if the proceeds of all the property received by the assignees under the assignment, are insufficient to pay the amount justly due the assignees, they cannot be holden, as trustees of the assignor under the trustee process of Massachusetts. *Beach* v. *Viles*, 2 Pet. 675. But see *Harris* v. *Sumner*, 2 Pick. 129.

See SET OFF.

ATTACHMENT.

Bank notes may be attached on mesne process, and seized and sold on execution. *Spence* v. *Blaisdell*, 1 N. H. Cas. 198.

BAIL.

The sickness of the principal, so that he could not be removed without endangering his life, at any time after judgment was recovered in the original action, to the time of the return of *non est inventus*, with the fact that he died after such return, and before the trial on *scire facias*, does not exonerate the bail. *Goodwin* v. *Smith*, 1 N. H. Cas. 29.

BANK NOTES. See ATTACHMENT.

BANKS.

1. Where B for A deposited bills of a bank to the amount of $ 7730 81 in the bank, at a time when the bills were current at fifty per cent. discount, and received from the bank a certificate which stated that $ 7730 had been 'deposited to A's credit, which is subject to his order on presentation of this certificate;' it was held that the bank was liable to pay the full amount stated in the certificate in gold or silver, when it was duly presented. *Bank of Kentucky* v. *Wister*, 2 Pet. 318.
2. B afterwards presented the certificate at the bank, demanding payment in gold or silver, which was refused by the cashier, who offered the amount in notes of the bank, which B refused. In an action by A against the bank, it was held that it was too late to object that a check from A did not accompany the certificate, as the bank by tendering the bills had put their own construction on the meaning of the certificate. *Ib.*

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. A bill drawn by a person in one of the states, upon a person in another of the states, is a foreign bill. *Buckner* v. *Finley*, 2 Pet. 586. S. P. by Washington, J. in *Lonsdale* v. *Brown*, 2 Pet. 688, App.
2. A bill payable at a certain time after date, need not be presented for acceptance. *Townsley* v. *Sumrall*, 2 Pet. 170.
3. If A verbally promises B that A and Co. will honor, accept, or pay bills drawn by C, to a certain amount, and B, within a reasonable time upon the credit of this promise, purchases two bills drawn by C on A & Co. to the specified amount, A is lia-

ble to B on this promise to the amount of the bills, if they are dishonored. *Ib.*

4. It makes no difference with regard to A's liability, whether the purchase was made before or after the drawing of the bills, or whether they were drawn to pay a pre-existing debt, or drawn and sold for any other good and valuable consideration. *Ib.*
5. A is liable, although B knew that A had no funds of C's in his hands at the time of making the promise to accept, and that he made the promise under the expectation of receiving such funds, and did not in fact receive them. *Ib.*
6. Nor is it any objection to A's liability that the object of taking the bill was to pay a partnership debt of B & C, who had at a former time been partners, and that it was passed to a creditor of the partnership, who subsequently returned it for the dishonor; B having upon the dissolution undertaken to discharge the partnership debts, and on the faith of A's promise having given up partnership property to the amount of the bill to C. *Ib.*
7. It is no objection to A's liability that the partnership accounts of B & C are unsettled; or that B had agreed with C in case both the bills should not be accepted, to assist him with funds to take up the non-accepted bill at maturity. *Ib.*
8. A mere statement made by B to C of the nature of the promise made by A does not vary A's liability, though it is evidence to be left to the jury to show what the promise actually made was. *Ib.*
9. Where a note is payable at the office of a bank, and the bank itself is holder of the note, and the note is at the bank at the day it becomes payable, no formal presentment is necessary. If the maker has no funds in the bank, and the note is not paid in bank hours, it is sufficient evidence of a presentment and refusal to change the endorser. *Bank of the United States* v. *Carneal*, 2 Pet. 543.
10. It is not necessary, in a suit against the endorser of such a note to prove negatively that the maker had no funds in the bank. But if he had funds in the bank at the time, it is matter of defence, and must be proved by the endorser. *Ib.*
11. The endorser of a note at the time it fell due, resided in Campbell county in Kentucky, without the limits of any post town, and about two miles from Cincinnati; and was in the habit of receiving his letters from the post offices in Newport and Covington, in Campbell county, and was also in the habit of receiving at the post office in Cincinnati, all letters directed to him at that place, and had ordered the postmasters there to detain all such letters for him until called for. A notice of the non-payment of the note which was payable at Cincinnati, was seasonably put into the post office in that place, directed to the

endorser, '*Campbell County*, Kentucky.' Such letters the postmaster was in the habit of sending by the mail to Covington. *Held* that the notice was sufficient. *Ib.*

12. A notary public, employed for the purpose, called at the house of the endorser of a note to give him notice of its dishonor, and finding the house shut and locked, ascertained from inquiry of the nearest resident that the endorser and his family had left town on a visit. He made no further inquiry where the endorser had gone, or how long he was expected to be absent, and made no attempt to ascertain whether he had left any person in town to attend to his business; but left a notice of the dishonor of the note at an adjoining house, requesting the occupant to hand it to the endorser on his return. It was *held* that this was sufficient diligence on the part of the holders of the note to charge the endorser. *Williams* v. *The Bank of the United States*, 2 Pet. 96.

13. A, the endorser of a note, at the time it fell due, occupied a dwelling-house, except the lower front room, which was occupied by his son, who did not reside in his family, as a store. The store had a separate entrance from the other part of the house, and no passage through it to the rest of the house. A was at that time postmaster of the town, and kept the post office in another part of the town, where he also transacted his private business. He had no concern in his son's store, though he was frequently about the door. Until he took charge of the post office, which was a year before the note fell due, written communications and notices for him were sometimes left at the store, and were carried to him by another of his sons, unless when he forgot it. After A took possession of the post office, if notices had been brought to the store, the bearer would have been directed to take them to the post office; or they would have been carried to him by his son, if recollected. It was *held* that a notice of the dishonor of the note, left at the store, was not sufficient to charge A as endorser. *The Bank of the United States* v. *Corcoran*, 2 Pet. 121.

14. It *seems* that if a notice left at an improper place, can be proved to have been received by the endorser in due season, he is thereby charged. *Ib.*

15. Where a bill, drawn in one state of the United States, is payable in another, a protest of the notary is evidence of the presentment and dishonor of the bill. *Townsley* v. *Sumrall*, 2 Pet. 170. S. P. by Washington, J. in *Lonsdale* v. *Brown*, in Circuit Court in Pennsylvania in 1821. His opinion is given in an appendix to 2 Pet. 688.

See PARTNERSHIP; JURISDICTION, 8.

CHANCERY AND CHANCERY PRACTICE.

1. Any persons belonging to a voluntary unincorporated religious

society, may bring a bill in chancery for the benefit of the whole society, for an injunction against persons disturbing the graves in the burial ground of the society. *Beatty* v. *Kurtz*, 2 Pet. 566.

2. In a bill to set aside a conveyance of real estate, fraudulently made to defeat the rights of creditors, it is not necessary to make a previous mortgagee of the estate a party to the bill, as his rights under the mortgage are not brought in question. *Venable* v. *The Bank of the United States*, 2 Pet. 107.
3. A bill ought not to be dismissed for want of proper parties, unless the complainant refuses to make such persons parties as the court directs. *Dandridge* v. *Washington's Executors*, 2 Pet. 370.
4. Where a testator directs his executors to provide for the education of certain persons out of certain funds, in a bill brought by one of the legatees to secure his share out of the funds, the other legatees should be made parties. *Ib.*
5. But residuary legatees are not necessary parties to such a bill. *Ib.*
6. The act of congress of May 3, 1802, allows proceedings to be had against non-residents by publication in the newspapers of the District of Columbia. Therefore where on a bill in chancery in that district, some of the defendants had been served with process, and the marshal returned as to others, 'non-residents in the county of Alexandria,' it was held that a decree dismissing the bill as to those not served with process, was erroneous, as some proceedings ought to have been had to bring them before the court. *Mandeville* v. *Riggs*, 2 Pet. 482.
7. Where some of the defendants in a bill did not answer, and it was taken as confessed against them, it was *held* that dismissing the bill against such defendants, and only decreeing against those who had answered, was erroneous. *Ib.*
8. Where some of the defendants in a bill die, during its pendency, a decree made against the other defendants, without making the personal representatives of those deceased, parties to the bill, is erroneous. *Ib.*
9. Under the prayer for general relief in a bill, other relief may be granted beside what is particularly prayed for; but the relief must be agreeable to the case presented by the bill. *English* v. *Foxall*, 2 Pet. 595.

COMMON CARRIER.

The law regulating the responsibility of common carriers, does not apply to the conveyance of slaves. The carriers of slaves, in cases of loss, are liable only for ordinary neglect. *Boyce* v. *Anderson*, 2 Pet. 150.

2. Where slaves, who had escaped from a burning vessel to the banks of the Mississippi, were taken into the yawl of a steam-

boat that was passing, in order to be carried on board the steam boat, from motives of humanity, and without any view to reward, at the request of the person having the care of the slaves, and were drowned by the upsetting of the yawl before it reached the steam boat: it was *held* that the owners of the steam boat were not liable to the owner of the slaves for their loss, unless the upsetting of the yawl was owing to gross negligence or unskilful conduct. *Ib.*

CONSTITUTION OF THE UNITED STATES.

1. A statute of a state authorizing a company to build a dam across a navigable creek, in which the tide ebbs and flows, is not void under the third clause of the section of the first article of the constitution which authorizes congress 'to regulate commerce with foreign nations, and among the several states,' congress having passed no law with regard to the navigation of such creeks. *Willson* v. *The Black Bird Creek Marsh Company*, 2 Pet. 245.
2. But if congress, in execution of the power to regulate commerce, had passed any statute to control state legislation over such creeks, it *seems* that a state law coming in conflict with such act, would be void. *Ib.*
3. In an ejectment in Pennsylvania, in which the Court of Common Pleas gave judgment for the plaintiff, the Supreme Court of that state, on error in 1825, reversed the judgment on the ground that 'the relation between landlord and tenant could not exist between persons holding under a Connecticut title,' and awarded a *venire facias de novo*. The legislature of Pennsylvania, Ap. 8, 1826, passed an act which provided 'That the relation of landlord and tenant should exist, and be held as fully and effectually between Connecticut settlers and Pennsylvania claimants, as between other citizens of the commonwealth, on the trial of any cause now pending or hereafter to be brought.' *Held* that this statute, in its application to the case which was pending when it was made, did not violate the tenth section of the first article of the constitution of the United States, prohibiting any state from passing any '*ex post facto* law or law impairing the obligation of contracts.' *Satterlee* v. *Matthewson*, 2 Pet. 380.
4. Retrospective laws, and laws divesting vested rights, passed by a state, unless *ex post facto*, or violating the obligation of contracts, are not prohibited by the constitution of the United States. *Ib.*
5. It is not a violation of the constitution of the United States for a state legislature to exercise judicial functions. *Ib.*
6. A tax imposed by a law of one of the States, or under the authority of such a law, on stock issued for loans made to the United States, is unconstitutional and void. *Weston* v. *The City Council of Charleston*, 2 Pet. 449.

7. Thus a tax on six and seven per cent. stock of the United States, imposed by an ordinance of the City Council of Charleston, exercising an authority under the state of South Carolina, is unconstitutional and void. *Ib.*
8. A law of the state of Ohio provides that in certain cases the occupying claimant of land, when it is recovered against him by the true owner, shall be entitled to recover the value of his improvements, to be assessed by commissioners appointed by the court in the suit in which the land is recovered. If the suit is at common law, and the value of the land exceeds twenty dollars, the value of the improvements must be determined by a jury, under the 7th amendment of the constitution. *Bank of Hamilton* v. *Dudley's lessee*, 2 Pet. 92.
9. A died in New Hampshire, seized of real estate in Rhode Island, having devised the same by will; his executrix proved the will in New Hampshire, and obtained a license from a probate court there to settle the real estate for the payment of debts. She sold the real estate in Rhode Island for that purpose, and made a deed of the same for that purpose, giving a bond to procure the confirmation of the legislature of Rhode Island. The proceeds of the sale were applied to the payment of the testator's debts. The legislature of Rhode Island passed an act ratifying and confirming her deed. *Held* that the estate was valid and rendered the title of the purchaser good against the devisee. *Wilkinson* v. *Leland*, 2 Pet. 627.

See JURISDICTION.

CONSTITUTION OF NEW HAMPSHIRE.

A fine or forfeiture to a captain of militia may be sued for and recovered by him after the repeal of the law under which it was incurred. A different construction would make the law of retrospective operation, and so contrary to the clause in the constitution of the state of New Hampshire prohibiting such laws in civil cases. *Dow* v. *Norris*, 1 N. H. Cas. 17.

CONTRACT.

1. A *subsequent* oral agreement to prolong the time for performing the promise in a written one, may be proved; or to substitute a different place of performance. *Robinson* v. *Batchelder*, 1 N. H. Cas. 40.
2. A written agreement towards the execution, that is, the fulfilment of which no steps have been taken by either party, may be discharged by an oral agreement to that effect. *Buel* v. *Spiller*, 1 N. H. Cas. 196.

CONSTRUCTION. See DESCENT.

CONVEYANCE.

Proprietors of common and undivided lands may convey a part of them to one of the proprietors, by a mere vote of the proprietors, without deed. *Coburn* v. *Ellenwood*, 1 N. H. Cas. 99.

COSTS. See PRACTICE, 1.

DAMAGE FEASANT. See FENCES.

DEED.

1. An endorsement upon a deed, if upon the instrument at the time of executing it, is a part of it. But to make it a part of the deed, it must be proved to have been made before the deed was executed. *Emerson* v. *Murray*, 1 N. H. Cas. 171.
2. The cancelling of a deed does not revest property which has once passed under it by transmutation of possession. *Farrar* v. *Farrar*, 1 N. H. Cas. 191.
3. But where a grantee has voluntarily and without any misapprehension or mistake consented to the destruction of the deed with a view to revest the title, he cannot be permitted to show by parol evidence the contents of the deed so destroyed, and in this way the destruction of a deed may have the effect of a reconveyance. *Ib.*
4. A mere agreement to cancel a deed, without actually cancelling it, cannot however have this effect. *Ib.*

See STATUTE.

DESCENT.

The statute of descents of Rhode Island, passed in 1822, provides that 'when the title to any real estate of inheritance as to which the person having such title shall die intestate, came by descent, gift, or devise, from the parent or the kindred of the intestate, and such intestate die without children, such estate shall go to the kin next to the intestate, of the blood of the person from whom such estate came or descended: held that the words, '*of the bood*,' comprehend relations of the half blood; and that the words, '*came by descent, gift, or devise*,' mean *immediate* descent, gift, or devise, and make the immediate ancestor, donor, or devisor, the sole stock of descent. *Gardner* v. *Collins*, 2 Pet. 58.

DOWER. See LIMITATIONS, 2.

ENDORSEMENT. See DEED, 1.

ERROR. See VERDICT.

ESTOPPEL.

Where the tenant in a writ of entry disclaims all title to the demanded premises, he and his subsequent assignees will be estopped ever after from setting up against the demandant and his subsequent assignees, any claim to the land which he had at the time of such disclaimer; and a subsequent agreement by the demandant to purchase all his rights, will not set the estoppel at large. *Hamilton* v. *Elliot*, 1 N. H. Cas. 182.

EVIDENCE.

1. The record of a suit between A and B, and C and D, cannot be used in evidence against C in another suit, to which neither A, B, nor D is a party. *Townsley* v. *Sumrall*, 2 Pet. 170.
2. In an action of trespass for mesne profits, brought against A,

after recovery of land in ejectment, where A was the real landlord of the defendant in ejectment, had received the rents during the period sued for, and employed counsel to defend the suit; *held* that the record of the recovery in ejectment is *prima facie* evidence against A of the plaintiff's title. *Chirac* v. *Reinecker*, 2 Pet. 613.

3. Depositions containing evidence of heirship and pedigree had been taken in the ejectment suit, and the substance of the evidence on these subjects was contained in a bill of exceptions filed in that suit by the plaintiffs, and sealed by the court. The depositions being afterwards lost; *held* that the testimony copied into the bill of exceptions was competent evidence of *pedigree* against A in the action for mesne profits. *Ib.*
4. Where the plaintiffs had proved by a surveyor that most of the lines and streets had been run by him as they were numbered in a plot in a book: *held* that this did not make the other plots in the same book evidence for the defendant without being proved. *Ib.*
5. Where several persons are associated together for an illegal purpose, any act or declaration of one of the parties, in reference to the common object, and forming a part of the *res gestæ*, may be given in evidence against the others. *American Fur Company* v. *The United States*, 2 Pet. 358.
6. Whatever an agent does or says in reference to the business in which he is at the time employed, and within the scope of his authority, is evidence against the principal, in criminal as well as civil proceedings. *Ib.*

See WITNESS.

EXECUTOR AND ADMINISTRATOR.

1. Where an executor having proved the will of his testator in one state, assigns a chose in action of his testator, a suit may be brought thereon by the assignee in his own name in another state, without any probate of the will therein, if the law of the latter state permits the assignee of a chose in action to sue in his own name. *Harper* v. *Butler*, 2 Pet. 239.
2. Where under a license of a judge of probate to raise a specified sum by the sale of real estate, an executor sold the whole of an entire piece of real estate for an amount exceeding the sum authorized to be raised, the sale was held to be void. *Adams* v. *Morrison*, 1 N. H. Cas. 166.

See MARRIAGE SETTLEMENT.

EXECUTION. See ATTACHMENT.

FENCES.

Owners of horses can turn them on the highway only where they own the adjoining land, and if the horses break into an enclosure from any other part of the highway, though it be through defect of the fence, the owner of them is liable to the owner

of the land for the damage; for the owner of the close is not obliged to fence against any animals except those which are rightfully in the adjoining highway or close. *Avery* v. *Maxwell*, 1 N. H. Cas. 36.

FIXTURES. See LANDLORD AND TENANT.

FOREIGN ATTACHMENT. See ASSIGNMENT.

FRAUDULENT CONVEYANCE.

1. A conveyance made to defeat the claims of creditors, was set aside and annulled, on a bill brought by a creditor for the purpose. *Venable* v. *The Bank of the United States*, 2 Pet. 107.
2. A decree for a large amount impending over a grantor of estate, at the time of the conveyance; relationship between the parties; variances in the nature and amount of the real consideration and that stated in the deeds; uncertainty of the amount of the consideration; the conveyances including the whole of the property of the grantor, real and personal; and unsatisfactory explanations of the parties; are among the circumstances which in this case were relied on as evidences of fraud. *Ib.*

See ASSIGNMENT; SALE OF CHATTELS.

HIGHWAY.

The use of a road by the public seventeen years, with the acquiescence of the owner of the land over which it passes, may be considered as evidence of the dedication of the land by the proprietor to the public for this purpose. The evidence of a fact inferred from such acquiescence, is not confined to any specific number of years, but depends upon the circumstances, and the court is to decide in such case whether such acquiescence, in any particular case, is to go to the jury as an evidence of the fact proposed to be established by it. *Pritchard* v. *Atkinson*, 1 N. H. Cas. 1.

INDIANS, TRADING WITH THE.

1. Under the United States statutes of 1802, c. 13, and 1822, c. 58, any trader licensed to trade with the Indians, who introduces into their country ardent spirits to vend or distribute among them, forfeits, not only his goods among which the spirits are found, but *all the goods* which he designed for sale to them under his license, carried into the Indian country. *American Fur Company* v. *The United States*, 2 Pet. 358.
2. To subject goods to seizure, under these statutes, the spirits must be carried into the territory in which the Indian title is not yet extinguished; carrying spirits into a territory purchased by the United States of the Indians, though frequented and inhabited exclusively by Indian tribes, is not an offence under these statutes. *Ib.*

INSURANCE.

1. A and B were entitled to one third of a mill absolutely, and to the remaining two thirds as mortgagees; but one moiety of the

whole was held under an agreement which had not been complied with, and which purported on its face to be void if not complied with; but the other contracting party had not declared it void, nor called for a compliance with it. It was held that A and B had an insurable interest in the mill. *Columbian Insurance Company* v. *Lawrence*, 2 Pet. 25.

2. A and B in a proposal for insurance on the mill against fire, describe it as 'property belonging to A and B,' and afterwards call it '*their* stone mill;' it was *held* that this was not a true representation of their title; and that the misrepresentation was material, and that therefore a policy made upon it was void. *Ib.*
3. Where a rule of an insurance company, printed on the back of a policy against fire, and referred to in the policy to explain the rights and obligations of the parties, provided, that if the insured caused the property insured to be described in the policy 'otherwise than as they really are, so as the same be charged at a lower premium than would otherwise be demanded, such insurance shall be of no force,' the policy is not invalidated by an untrue description of the building insured, unless the misdescription be fraudulent, or cause the property to be insured at a less premium than it would otherwise have been. These are questions of fact to be decided by the jury. *Ib.*

JUDGMENT.

1. Where a court has jurisdiction over the subject matter of a judgment or decree, which appears on the face of the proceedings; the judgment is conclusive, when brought up collaterally in another court, and its validity cannot be questioned on accouut of any error or mistake in the proceeding. *Thomson* v. *Tolmie*, 2 Pet. 157.
2. Where a sale of the estate of minors is made by order of a court having jurisdiction of the subject, the title of a purchaser is not liable to be invalidated on account of any error in law or fact, or irregularity in the proceedings before the court. *Ib.*

JUDGMENT, FINAL. See JURISDICTION, 2.

JURISDICTION.

1. In order to give jurisdiction to the Supreme Court of the U. States, in writs of error, under the U. S. stat. 1789, c. 20, s. 25, it is not necessary that the record should state in terms that the constitution or a law of the United States was drawn in question; it is sufficient to bring the case within the provisions of the statute, if the record shows that the constitution or a law of the United States must have been misconstrued or the decision could not have been made, or that the constitutionality of a state law was questioned, and that the decision was in favor of the party claiming under such law. *Willson* v. *The Black Bird Creek Marsh Company*, 2 Pet. 245; *Satterlee* v. *Matthewson*, 2 Pet. 380.

2. Where certain individuals were incorporated as the president and directors of a bank, of the stock of which a state was sole proprietor, it was *held* that the state was not a party to a suit against the bank, and therefore that the bank was liable to be sued in the courts of the United States. *Bank of Kentucky* v. *Wister*, 2 Pet. 318.
3. A prohibition was issued in a state court to prevent the levying of an unconstitutional tax; in the highest court of the state, on appeal, the judgment was reversed, and judgment given for the defendant. *Held*, that this last judgment was a *final judgment* in a *suit*, within the meaning of the judiciary act of 1789, c. 20, s. 25; and therefore that the Supreme Court of the United States had jurisdiction of a writ of error brought to reverse it. *Weston* v. *The City Council of Charleston*, 2 Pet. 449.
4. A case will not be dismissed by the Supreme Court on motion, for want of jurisdiction, on account of the Circuit Court's having exceeded its jurisdiction in the decree complained of. *Canter* v. *The American and Ocean Insurance Company of New York*, 2 Pet. 554.
5. The Circuit Court of the United States have no jurisdiction of a suit brought by an alien, unless the defendant is a citizen of the United States. *Jackson* v. *Twentyman*, 2 Pet. 136.
6. The Circuit Courts cannot take jurisdiction of such a case, unless the citizenship of the defendant is averred upon the record. *Ib.*
7. Where the plaintiffs are all aliens, the courts of the United States have jurisdiction of a case in which some of the defendants are citizens of the state in which the suit was brought, and some are citizens of other states. *Conolly* v. *Taylor*, 2 Pet. 556.
8. Where several aliens brought a bill in chancery, in which a citizen was also joined as plaintiff, all the persons for whose benefit the suit was brought being aliens, and in the progress of the suit in the Circuit Court the name of the citizen was on motion struck out as plaintiff, and he was made defendant; *held* that the Circuit Court had jurisdiction of the case. *Ib.*
6. The U. S. statute, 1789, c. 20, s. 11, provides that no District or Circuit Court shall 'have cognizance of any suit to recover the contents of any promissory note, or other chose in action, in favor of an assignee; unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made; except in cases of *foreign bills of exchange*.' *Held*, that a bill of exchange drawn in one state, and payable in another, was a *foreign bill*, and therefore that the Circuit Court of the United States had jurisdiction of an action brought on such a bill by an endorsee against the

drawer of such a bill, although the drawer and payee were inhabitants of the same state. *Buckner* v. *Finley*, 2 Pet. 586.

9. Where two parties claimed the right to be guardian of a minor, it was *held* that the *value in dispute* was not the value of the minor's estate, but the value of the office of guardian; and it appearing that the compensation for the services of guardian could not in any event amount to a sum large enough to support an appeal to the Supreme Court of the United States, though the amount of the estate would have been of sufficient value, it was *held* that no appeal would lie. *Ritchie* v. *Mauro*, 2 Pet. 243.

10. The District Court of the Northern District of New York, by the U. S. st. 1814, c. 108, has, besides its jurisdiction as a district court, jurisdiction of all causes, except appeals and writs of error, cognizable by law in a circuit court. By the statute of U. S. of May, 1826, it was enacted 'that appeals and writs of error shall lie from decisions in the District Court for the Northern District of New York, when exercising the powers of a circuit court; and from decisions which may be made by the Circuit Court for the Southern District of said state, in causes heretofore removed to said Circuit Court from the said District Court, sitting as a circuit court, to the Supreme Court of the United States, in the same manner as from circuit courts.' An action brought in the District Court for the Northern District Court, which was equally cognizable in a circuit or district court, was carried by writ of error to the Circuit Court of the Southern District of New York. It was *held* that the Supreme Court of the United States had no jurisdiction of a writ of error brought on the judgment of the Circuit Court, on the ground, that the District Court in taking cognizance of it was not acting as a circuit court. *Southwick* v. *The Postmaster-General*, 2 Pet. 442.

See JUDGMENT.

LANDLORD AND TENANT.

1. A building two stories high in front, with a cellar of stone or brick, and a brick chimney resting on the stone or brick foundation, and a shed of one story, were erected by a lessee, during his term, on the land leased to him. These buildings were erected with a view to carry on his business of a dairyman, and for the residence of his family and servants engaged in his said business. The cellar in which was a spring, was used as a milk cellar; and the utensils of his said business were kept, scalded, washed, and used in the upper part of the house, in which his family resided. The lessee was also a carpenter, and had tools and two apprentices in the house, and a work bench out of doors, and worked in the house at his trade of a carpenter. *Held*, that the house did not become part of the

freehold, and might be rightfully removed by the lessee during the continuance of his lease. *Van Ness* v. *Pacard*, 2 Pet. 137.

2. In an action on the case by a lessor against his lessee for removing buildings erected by him during the lease, evidence is admissible to show a usage or custom of the place in which the land lies, for tenants to make such removals of buildings during their term. *Ib.*

LANDS AND LAND TITLES.

1. Where the government of the United States has, by its acts, given a construction to a treaty, the courts of the United States are bound to regard that construction as correct. *Foster* v. *Neilson*, 2 Pet. 253.
2. A title to a tract of land lying in the east parish of Feliciana, in the state of Louisiana, thirty miles east of the Mississippi, derived under a grant made by the Spanish government, Jan. 2, 1804, was *held* to be void, on the ground that it was included in the territory of Louisiana ceded to the United States by France in 1803. *Ib.*
3. By the second article of the treaty of the United States with Spain, of 1819, 'his Catholic Majesty cedes to the United States in full property and sovereignty, all the territories which belong to him, situated to the eastward of the Mississippi, known by the name of East and West Florida.' It was *held* that this was not an admission on the part of the United States that the whole of West Florida, including the territory between the Mississippi and Iberville on the west, and the Perdido on the east, which was claimed by Spain, belonged to Spain at the time of the treaty. *Ib.*
4. The eighth article of the same treaty provides, that 'all grants of land made before the 24th of January, 1818, by his Catholic Majesty, or by his lawful authorities, in the said territories ceded by his majesty to the United States, *shall be ratified and confirmed* to the persons in possession of lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of his Catholic Majesty.' It was *held* that this clause did not operate as a present ratification and confirmation of titles, but required some act of the legislature of the United States to carry it into effect. *Ib.*
5. A clause introduced into the ratification of the same treaty by the king of Spain, which provided that three specified grants, made by him of lands in Florida, one of which was of lands west of the Perdido, and consequently in the disputed territory, between that river and the Mississippi, should be annulled and invalid, did not operate to confirm on the part of the United States, other grants in the same territory not excepted. *Ib.*

LOUISIANA. See LANDS AND LAND TITLES.

LIMITATIONS.

1. Land was appropriated by the owner for the use of the Lutheran Church, but he made no deed of it, and by his consent the German Lutherans had used it as a place of burial, and had erected a building on it, which was used as a school house, and sometimes as a church, and they kept the land enclosed. The Lutherans were never incorporated as a religious society. It was *held* that the heirs of the original owner after fifty years from the time the land was first dedicated to pious uses, had no title to it. *Beatty* v. *Kurtz*, 2 Pet. 566.
2. A writ of dower is not within the statute of limitations of New Hampshire. The statute only applies to actions, entries, and claims founded upon a previous seizin or possession of the lands or tenements from which the time of the limitation may be dated. *Barnard* v. *Edwards*, 1 N. H. Cas. 107.

MARRIAGE SETTLEMENT.

1. Where a marriage settlement provided, that on the death of the husband, if the wife survived, the trustees should receive a certain sum from his executors, which was to be invested in certain specified sorts of securities, '*with the approbation*' of the wife. *Held* that the trustees in investing the money were bound to invest it in such of the securities as she directed, and could not invest it in any other of the securities mentioned in the settlement. *English* v. *Foxall*, 2 Pet. 595.
2. Where in such case the trustees were also executors under the will of the husband with other executors, it was *held* that the trustees were still bound to separate the sum provided in the settlement from the mass of the husband's estate, and invest it in such of the enumerated securities as the widow directed. *Ib.*
3. The will of the husband ratified the settlement, and provided that if the sum specified in the settlement should be found insufficient to raise a certain annual sum for the wife, the trustees under his will should transfer to themselves as trustees under the settlement, sufficient sums from time to time to make up the amount of the specified annual sum. The stock in which the widow wished her money to be invested would not yield the full amount of the annuity, and if invested in a different manner in other stocks authorized by the settlement it would probably yield the full amount of the annuity. *Held* that the executors were bound to make up the deficiency in the annuity out of the husband's personal estate. *Ib.*

NEW TRIAL.

1. An affidavit of jurors tending to show that they misapprehended the instructions of the judge, is not permitted to be read in support of a motion for a new trial. *Tyler* v. *Stevens*, 1 N. H. Cas. 116.
2. When a party is surprised at a trial by the evidence upon a particular point, it is a good cause for motion to delay the trial, but

where no such motion is made, it is not a good ground for a subsequent motion for a new trial. *Willard* v. *Wetherbee*, 1 N. H. Cas. 118.

NOTICE.

Notice by a committed debtor to the creditor of an intention to take the poor debtor's oath, left at the office of the creditor's attorney, who was absent, but whose office was in the chamber over the store occupied by the person with whom the attorney boarded, is not sufficient, under the statute requiring 'notice to the creditor or his agent or attorney.' *Madison* v. *Rano*, 1 N. H. Cas. 79.

PAROL EVIDENCE. See CONTRACT.

PARTNERSHIP.

A B and C D were partners in the business of buying and selling pork, each of them also carrying on a separate business. B was the active partner. By their articles of copartnership, it was agreed that the money for the partnership should be borrowed on D's note endorsed by B, or in any other way which might be suitable. The money of the partnership was deposited in the banks under B's name, with his own money. No style of partnership was agreed on in the articles; but the partnership was generally known and called by the name of B and D, and they advertised and transacted business under that style, and the books of the partnership were kept in their joint names. When the partnership was dissolved, B became bound to pay the debts of the firm, and afterwards B drew a bill in his own name, by negotiating which he raised money to pay a debt due from the firm, and applied the proceeds of the bill for that purpose. It was *held*, that an action against B and D on this bill, declaring on it as having been drawn by the trading partners under the name of A B, could not be maintained. *Le Roy* v. *Johnson*, 2 Pet. 186.

PARTIES. See CHANCERY AND CHANCERY PRACTICE.

PATENT.

1. If the discoverer of a new invention suffers it to be used by others, he cannot afterwards secure it to himself by a patent. *Pennock* v. *Dialogue*, 2 Pet. 3.
2. It *seems*, that if one person should discover an invention, and another person should afterwards discover the same invention, and bring it into public use before any patent taken out by the first inventor, the first inventor would lose his right to take out a patent. *Ib.*

PEDIGREE. See EVIDENCE, 3.

PEW.

By the grant of pews, a parish does not lose the right to remove the meeting-house in pursuance of a regular vote for the purpose. *Fisher* v. *Glover* 1 N. H. Cas. 180.

PIOUS USES.

No specific grantee capable of holding land, is necessary, in order to support a gift of land for public and pious uses. *Beatty* v. *Kurtz*, 2 Pet. 566.

PLEADING.

1. Where *non assumpsit* was pleaded at the first term, and a plea of accord and satisfaction made after the commencement of the suit was pleaded at a subsequent term, as a bar to the further maintenance of the action, the court intimated an opinion that the latter plea, though not in form *puis darrein continuance*, was yet substantially of the same character, and was a waiver of or substitute for the general issue. *Bank of the United States* v. *Carneal*, 2 Pet. 543.
2. A plea by the tenant, of non-tenure, to a writ of entry, beginning, 'And the said B comes and defends when, &c. and prays judgment of the said writ,' and concluding, and 'this she is ready to verify,' &c. 'wherefore' &c. is bad on demurrer, for not adding 'she prays judgment of the said writ,' &c. *Pike* v. *Bagley*, 1 N. H. Cas. 76.

PRACTICE.

1. Where the declaration contained counts on sixty-seven bank notes, instead of sixty-eight, one having been omitted by accident, and the verdict and judgment were for a sum including the whole sixty-eight; on error to the Supreme Court of the United States, the court allowed the original plaintiff to enter a *remittitur* of the sum recovered on account of the omitted note, on payment of costs, if the writ of error should be prosecuted no further after the amendment, and affirmed the judgment of the court below deducting that amount. *Bank of Kentucky* v. *Ashley*, 2 Pet. 327.
2. Where a party to a suit died after the commencement of the term, and the court decided the case after argument, without hearing of his decease, the court ordered the decree to be entered as of the first day of the term. *Bank of the United States* v. *Weisiger*, 2 Pet. 481.
3. Where an appeal from a Circuit Court to the Supreme Court of the United States, was prayed by a number of defendants, and one only executed the proper appeal bond; an objection to the proceeding must be taken by preliminary motion to dismiss the appeal for irregularity, on account of the failure to give the proper appeal bond. It cannot be made on the argument of the case. *Mandeville* v. *Riggs*, 2 Pet. 482.
4. A statute passed by a state to regulate proceedings in suits, cannot change the mode of proceeding in the courts of the United States; thus it cannot compel the courts of the United States to appoint commissioners for the decision of questions which a court of common law must submit to a jury. *Bank of Hamilton* v. *Dudley*, 2 Pet. 492.

See JURISDICTION. 4, 6, 8.

PRINCIPAL AND AGENT. See AGENT.

PROHIBITION. See JURISDICTION, 3.

PROPRIETORS OF COMMON UNDIVIDED LANDS. See CONVEYANCE.

RETROSPECTIVE LAW. See CONSTITUTION OF NEW HAMPSHIRE.

RELEASE. See AGREEMENT NOT TO SUE.

SALE OF CHATTELS.

A, being in debt, delivered goods to B, one of his creditors to whom he was indebted in a greater sum than the value of the goods, with a bill of parcels describing the goods and the prices, and stating that the same were bought by B, and that A had received payment. It was at the same time agreed that the goods should be sold by B and the proceeds applied to the payment of the debt due to B, and if any thing remained, B should account for it with A. It was *held* that this agreement was a fraud which rendered the sale void with respect to creditors. *Parker* v. *Pattee*, 1 N. H. Cas. 176.

SET-OFF.

A note not negotiable being assigned, the maker having orally promised, after it became due, to pay it to the assignee, has no right after this, in an action in the name of the payee for the benefit of his assignee, to set-off any demand he has against the original payee. *Wiggin* v. *Damrell*, 1 N. H. Cas. 69.

SLANDER.

In an action for slander it is not competent to a jury to infer that there was no malice in uttering the slanderous words merely from the circumstances that they were spoken only once and stated as common report. *Mason* v. *Mason*, 1 N. H. Cas. 110.

SLAVE.

The law of Maryland of 1796, c. 47, s. 13, provides that no manumission by will shall be effectual to give freedom to a slave, unless the slave 'be under the age of forty-five years, and *able to work and gain a sufficient maintenance and livelihood* at the time the freedom given shall commence. *Held* that the emancipation of a boy by will, who was between the age of ten and eleven at the testator's death and able to support himself by his labor, was valid. *Le Grand* v. *Darnall*, 2 Pet. 664.

STATUTE.

A statute of a state ratifying and confirming a *void* deed, will have the effect of passing a good title to the purchaser in the deed if such be the obvious intention of the legislature; the technical rule as to the confirmation of a *void* deed by a private person not applying to a legislative act. *Wilkinson* v. *Leland*, 2 Pet. 627.

See CONSTITUTION OF THE UNITED STATES.

SUIT. See JURISDICTION, 3.

TENDER.

To satisfy and discharge a written agreement for the delivery of specific articles, it is not enough to offer them on condition that the agreement be given up; they must be offered absolutely and unconditionally. *Robinson* v. *Batchelder*, 1 N. H. Cas. 40.

TREATIES. See LANDS AND LAND TITLES.

TRESPASS FOR MESNE PROFITS. See EVIDENCE, 2.

TRUSTEE PROCESS. See ASSIGNMENT.

TRUSTEES. See MARRIAGE SETTLEMENT.

USURY.

A loan was made of depreciated bank notes, which were then current at less than their nominal value; and a note taken for the nominal amount of the bills payable with interest. *Held* that the contract was usurious. *Bank of the United States* v. *Owens*, 2 Pet. 527.

2. The act incorporating the bank of the United States provides 'that it shall not take more than at the rate of six per centum per annum upon its loans or discounts;' *held* that a note on which a larger rate of interest than six per cent. had been reserved by the bank, was *void;* and that not even the money actually loaned could be recovered on it. *Ib.*

WILL. See MARRIAGE SETTLEMENT.

WITNESS.

In an action commenced against A and B as partners alleging a joint promise, the process not having been served on A, and the action consequently abating as it regards him, A, if B release him, becomes a good witness for B. *Le Roy* v. *Johnson*, 2 Pet. 186.

WILL.

A testatrix in her will directed her executors to invest certain funds, and then continued, 'it is my desire that the interest thereof shall be applied to the proper education' of her nephews, A, B, and C, 'so that they may be severally fitted in some useful trade; and to each of them who shall have lived to finish his education, or to reach the age of twenty-one years, I give and bequeath one hundred pounds to set him up in his trade.' *Held* that A, B, and C were not entitled to the whole interest on the funds, whatever might be its amount, but only to enough to provide for their education, for a useful trade, not for a profession, but that the allowance for this purpose should be liberal if the fund would admit of it. *Dandridge* v. *Washington's Executors*, 2 Pet. 370.

VERDICT.

In trespass *de bonis asportatis* the defendant pleaded, first, not guilty, upon which issue was joined; and secondly, in bar, that he took the goods as the property of a third person by virtue

of a writ of attachment and issue was joined on the plaintiff's property in the goods. The jury found, that the goods were the property of the plaintiff at the time of the taking, and assessed the damage, whereupon judgment was rendered for the plaintiff. A writ of error being brought, the verdict was held to be imperfect and the judgment was reversed for that cause. *Holman* v. *Kingsbury*, 1 N. H. Cas. 104.

LEGISLATION.

Pennsylvania.

The general assembly of this state, at the session of 1828–29, passed two hundred and sixteen statutes and eleven resolutions. This mass of legislation fills three hundred and eighty octavo pages. Of the acts, twenty-two only are public, exclusive of those which relate to the construction of canals, railroads, state roads, &c.

No. 51. *Electors of the President and Vice President of the United States.* If any of the electors shall be absent from the seat of government, or shall die, resign, or be prevented by any other means from acting, the remaining electors shall choose, *viva voce*, persons to fill up the vacancies. The names of the persons chosen shall be immediately transmitted to the governor, who shall, without delay, notify to them their election.

No. 136. *Senate and House of Representatives.* This act provides that until the next enumeration of the taxable inhabitants of the state, the Senate shall consist of thirty-three members, and the House of Representatives, of one hundred members.

No. 98. *Executors.* If any sole executor shall remove from his usual place of abode, and shall cease for one year to have any known place of residence in the state, the orphans' court of the proper county, on the application of any creditor or other person interested in the estate of the testator, shall vacate the letters testamentary and award letters of administration of the goods unadministered. But if there is a co-executor, the court may vacate the letters testamentary, only in respect to the executor who shall so remove.

Where any person shall appoint his judgment debtor his executor, and the judgment shall be a lien on the real estate of the executor, if the judgment is bequeathed, or if there is any creditor interested in preserving the lien, the legatee or creditor may issue a writ of *scire facias* against the executor, to revive the judgment and continue the lien; and the judgment so revived shall remain for the use of all persons interested.

No. 117. *Land Patents.* This act modifies the provisions of a former act passed Jan. 25, 1816, in regard to the interest on the purchase money. It also provides that patents shall be recorded, within six months from the date, in the county where the land lies; otherwise, they shall be void; but new patents may

be issued, upon payment of the money due thereon. The receipts of payments may be recorded in the margin of the record, which record shall be *prima facie* evidence of such payment. Patents may issue, agreeably to the provisions of this act, to trustees, guardians, executors, or administrators in whom the power of disposing of the land is vested. The benefit of this act is to extend only to such persons as shall comply with its provisions within two years from its passage. It is also provided that the provisions of the act shall not extend to any lands north and west of the Ohio and Alleghany Rivers.

No. 201. *Trustees.* This act provides, that trustees under a domestic attachment, on the settlement of their accounts before the proper court and a confirmation thereof, may be discharged from further responsibility, and that the several courts of common pleas shall have power to compel them to settle their accounts.

No. 205. *Assignment of Judgments, &c.* Where judgments, bonds, or other contracts shall be assigned, if the assignor shall die before suit brought, and no letters of administration shall be taken out within three months after his decease, or if he shall leave the state or cannot be found, the assignee may proceed by execution on the judgments, or prosecute his action at law, in his own name. If the assignor shall die after suit brought, the suit may proceed as if he were living. The equitable plaintiff shall be liable to execution on judgment in favor of the defendant.

No. 204. *Crimes and Punishments.* This act provides, that persons convicted of murder in the second degree, manslaughter, high treason, arson, burglary, forgery, robbery, mayhem, kidnapping, horse stealing, and perjury, shall be imprisoned in one of the penitentiaries, and be kept in solitary confinement at labor for a longer or shorter period, according to the nature of the offence; and that no access shall be had to them, except by the official visiters, officers of the institution, grand juries, and such other persons as may be admitted for *highly urgent reasons.*

It also regulates the management and government of the penitentiaries. Among the regulations we notice the following: The inspectors of the penitentiary are required in their weekly visits to speak to each prisoner, out of the presence of any person employed therein, and to examine into the truth of any complaint of oppression or ill conduct. No prisoner shall be discharged while laboring under a dangerous disease, although entitled to a discharge, unless by his own desire. None but the official visiters shall have any communication with the convicts. When a prisoner is to be discharged, the warden shall obtain from him his former history; what means of education he has enjoyed; his general habits; what early temptations he was exposed to, and where he intends to fix his residence. This shall be entered in a book for the purpose, and if his conduct has been satisfactory, he shall receive four dollars from the state.

No. 168. *Agencies for Insurance.* Agents of individuals, or associations of individuals, not incorporated and authorized by the laws of this state to make insurance, shall pay annually to the state treasurer twenty per cent. upon the amount of all premiums received by them, or agreed to be paid to them. They shall also furnish to the Auditor-General a true account of all such premiums and a list of the amount of insurances. If any agent offend against the provisions of the act, he shall forfeit one thousand dollars for every insurance made. One half of the fine shall be paid to the informer, and the other half shall be applied for the benefit of the poor. Agents and their principals, notwithstanding such forfeiture, shall be responsible for the payment of the percentage on premiums.

No. 210. *Banks.* Banks are authorized to loan to or purchase the stock of the state, from agents appointed by the state for such purposes; but they are not authorized to make such purchases of any individual or corporation, except in satisfaction of debts previously contracted in the course of their dealings.

District of Columbia. A resolution was passed by the legislature, instructing the senators and representatives of the state in congress to procure, if practicable, the passage of a law abolishing slavery in the District of Columbia.

American Colonization Society. A resolution was passed recommending this society to the support of the general government.

No. 192. *Waters of the Delaware.* Three commissioners are appointed to meet commissioners on the part of the state of New Jersey, to ascertain in what manner and at what places the waters of the Delaware may be most advantageously taken for feeding canals, and erecting water powers, without injury to the navigation of the river, and to conclude an agreement respecting the same, which, when ratified by the legislatures of the two states, and assented to by congress, shall be binding.

[In the preceding number of the Jurist, we noticed a corresponding act passed by the legislature of New Jersey.]

Internal Improvements. A very large proportion of the acts of this session relate to the subject of internal improvements. State roads are to be laid out in every direction. Among the companies incorporated, we notice seven for constructing turnpike roads; two for constructing railroads; and a railroad and coal company. The canal commissioners are required to locate the 'route of a suitable navigation, either by canal or by canal and slack water,' between Pittsburg and the borough of Erie; and to improve the navigation of the Monongahela from Pittsburg to the Virginia line. For the purpose of prosecuting and completing the canals and railroads, undertaken by the state, the governor is authorized to borrow, on the credit of the state, $3,000,000, at an interest

not exceeding five per cent. which may be repaid at any time after the expiration of twenty-five years. A person to be styled the Engineer in Chief of the Commonwealth, and Superintendent of Surveys, is to be appointed by the canal commissioners, whose powers under their direction shall extend to all canals and railroads.

Among the private acts we notice several for the legitimation of natural children; ten divorces; one act for changing the name of a person; several granting pensions to revolutionary soldiers and to the widows of such soldiers; an act incorporating certain individuals, for the purpose of establishing a 'Classical and Agricultural School;' and an act incorporating a Marine Railway Company. Several religious societies are also incorporated; among which is 'The *First Turkey Foot Regular* Baptist Society.'

Many of the acts of this session are drawn up without a proper degree of care. In general, the laws evince great liberality and enterprise, and deserve to be printed on better paper.

Illinois.

The laws of Illinois have undergone a revision in pursuance of an act of January 10, 1825, in which the judges of the Supreme Court of the state assisted, and the laws as revised, arranged under several titles in alphabetical order, were passed at the last session of the legislature, which commenced on the first Monday of December, 1828, and the new code has since been published in a small octavo volume of 237 pages, presenting the novel form of a code in which the titles are arranged alphabetically. We note only those provisions which appear to be most striking, and likely to excite the interest or gratify curiosity of readers in the other states, either from their novelty, utility, or singularity, or importance, or their relating to subjects under discussion in other states.

Appropriations. Among other things, to pay the speakers of the senate and house $4 a day each; members, $3; principal clerks of the senate and house, $5 each; other clerks, $4. To Wm. W. for administering oaths to members of the general assembly, $6; in state paper, to the printer for printing bills, messages, reports, rules, &c. $325; house rent for sittings of Supreme Court, $18; to G. F. for extra official duty and for losses in purchasing stationary for the state occasioned by depreciation of the state paper, $2; to the governor, judges of the Supreme Court, attorney-general, and state's attorneys, severally, 5 per cent. on the amount of their salaries on account of the depreciation of state paper money in which they had been paid; to the clerk of the house for furnishing a copy of the journal of the senate for the press, $250 in state paper money; and to the judges of the

Supreme Court, $250 each, for their services in revising the laws.

[We have noticed only the appropriations which give statistical facts of some interest, and afford grounds of comparison with the expenditures in other states. We may as well add here a notice of the treasurer's account which appears in the end of the volume, from which it appears that the state debt is $45,000, which consists in outstanding treasury warrants, to meet which the auditor states debts due to the state of $49,000, including $19,000 due from a former treasurer.]

Canal. To be opened 'to effect a navigable communication between lake Michigan and Illinois River;' the commissioners appointed to explore the route and procure surveys, 'as soon as they may be able to command sufficient funds, and deem it expedient shall commence the work.' The remainder of the act provides for the location and sale of the lands granted by act of Congress of March 2d, 1827, for promoting the opening of the canal. This is the fourth projected route for a canal communication between the waters of the Mississippi and the northern lakes, two of the others being in Ohio, and one in Pennsylvania.

Census. The act for taking a census of the state provides that the returns shall distinguish the number of whites, and mark their ages in periods of ten years, negroes and mulattoes; and also state the factories, mills, machines, and distilleries.

[It is matter of surprise that acts for taking a census, whether of the United States or a state, do not require the professions and trades to be specified; which are of much more importance, in a statistical view, than the ages. Statistical facts in relation to the subject of education, might also be added, as well as the number of apprentices in the different trades. And why not require a return of the number of pleasure carriages, waggons, &c.? horses, cattle, sheep; land in tillage, meadow, pasture, wood? The different kinds of tillage? And all those facts which show the state of industry, arts, capital, and productive capacity? All these facts can be obtained with very little trouble and expense, additional to those of taking the number and ages of the inhabitants. To compare this public proceeding with an individual case: A mechanic, for instance, whose age and the number and ages of his family, and journeymen and apprentices, would give some faint knowledge of his economy and business; but an account of stock accurately taken at successive periods, would afford a much better insight into his affairs. A census of the United States, or a state, ought to be an occasion of taking a great national or state account of stock. It would then give a thousand statistical details which are of great practical importance in legistion, war, industrial enterprises, in short, in all subjects of general inquiry and public interest where we are now obliged to speculate

and conjecture in the dark, in frequent disputes about facts, which may be ascertained to a certainty; and which can be satisfactorily ascertained only by the agency of the government.]

Chancery. The courts having chancery powers are authorized to decree specific performance of contracts for the sale of lands, where the obliger, in such contract, was deceased, without executing the same.

Acknowledging of Deeds. Deeds may be acknowledged before judges of the supreme, circuit, or district courts of the United States, commissioners for taking acknowledgments, any clerk of a court of record, mayor of a city, notary public, or justice of the peace; 'but if such justice resides out of this state, there shall be added a certificate of the proper clerk, setting forth that the person before whom such acknowledgment was made, was a justice of the peace at the time of making the same.' A certificate of the county commissioners' court is annexed, authenticating the justices' commission, in case of his living in the state, unless he resides in the county where the land is situated, in which case no certificate needs to be annexed.

Registry of Deeds. All conveyances are to be recorded within six months after execution, to make them good against subsequent purchasers, 'and if not recorded within that time, they shall be adjudged void, as against any subsequent purchaser or mortgagee for valuable consideration, unless such deed or conveyance shall be recorded before the recording' of the subsequent conveyance. If the grantee is a resident in the state, but not of the county where the land lies, the deed may be recorded in the state recorder's office.

Judges of Probate are elected by joint ballot of the assembly, and *hold their offices during good behavior.*

The Supreme Court consists of four judges, 'and exercises appellate jurisdiction *only*, (except in some specified cases,) and has final jurisdiction of all matters of appeal, error, or complaint from the judgments or decrees of the circuit and other inferior courts, wherein the rules of law, or principles of equity appear to have been erroneously adjudged.'

'There shall be but one term of the supreme court holden annually at the seat of government.'

'Said court shall in all cases state the case, and give their opinions in writing.'

'The supreme court shall have *original* jurisdiction in all causes, suits, and motions against public debtors, sheriffs, clerks, and all collectors of the public revenue to the state.'

The judges hold circuit courts in the respective counties twice a year. Salaries $ 1000 each.

Elections. At the election of governor, senators, or members of congress, &c. the judges of the county commissioners' court,

appoint judges of elections; the votes are given either by ballot or *viva voce*, as the elector chooses, and *every vote is recorded by the clerk of the election, with the name of the voter*. Voting more than once subjects the party to a fine of one hundred dollars. If any doubt is suggested as to the qualifications of a person offering to vote, he is put under oath at the polls, as to his qualifications, and opposite testimony may be received at the same time, the judges of the election to decide. These judges may impose a fine not over twenty dollars for disorderly conduct at the election. If different candidates have the highest, and an equal number of votes, *the choice is to be decided by lots*. 'If any candidate shall desire to contest the validity of any election, [to the General Assembly] he shall give notice of his intention in writing to the person whose election he intends to contest, within thirty days after the election, expressing the grounds of objection, the name of the justice of the peace who will attend at the taking of the depositions, and the time when the depositions will be taken,' and the person whose election is contested may name another, and those two a third, to take the testimony. The members of the general assembly are elected for two years, the governor and lieutenant governor for four.

Idiots, &c. 'Whenever any idiot, lunatic, or distracted person, has any real or personal estate, the judge of the Circuit Court shall, on the application of any creditor or relation, *order a jury to be summoned* to ascertain whether such person be a lunatic, insane, or distracted;' and if the jury return that he is an idiot, &c. the court is to appoint a *conservator*.

Insolvent Debtors. If a debtor fails to satisfy an execution, the creditor makes affidavit of the fact, and a *ca. sa.* is thereupon issued, upon which the debtor is brought before the judge of probate of the county, and is required to make an assignment under oath of all his property, or enough to satisfy the execution; and the property so assigned is for the use of his 'creditor or creditors.' The assignment may be examined by creditors and contested; and questions, as to the fraud of debtor, tried by jury forthwith, and on the assignment being completed the debtor's person is discharged, and the property disposed of by the assignee for the benefit of the creditors.

Judgments and Executions. 'A judgment shall be a lien on lands, tenements, and real estate, for the period of *seven years*.' 'When a judgment shall have become a lien, and the defendant happen to die before execution levied, the remedy shall not be delayed by reason of the non-age of any heir.'

Certificates of land give the holder an interest liable to be taken on execution.

Lands are *sold on execution at public vendue* to the highest bidder; unless the judgment is recovered on a contract made

previously to the time of the act being in force, viz. May 1, 1825, in which case the land is not sold, unless two thirds of the appraised value is bid. The debtor may redeem the land within twelve months, on paying ten per cent. interest on the price at which it was bid off. Mortgaged *lands may be sold* to satisfy the debt for which they are pledged.

Justices of the Peace and Constables are elected by the inhabitants of the county.

Bail for appearance is discharged if 'the original defendant's health was such as to endanger his life by surrender.'

Betterments. 'Every person evicted from land for which he can secure a plain title deduced from the record of some public office, without notice of adverse title in like manner derived from record, shall be exempt from action for rents or profits prior to notice of adverse claims.' And in case of eviction, he shall be allowed for improvements made before notice.

Common Law and English Statutes. 'The common law of England, all the statutes of the British parliament made in aid of the common law prior to the fourth year of James I. (excepting stat. 43 Eliz. c. 6, s. 2; 13 Eliz. c. 8, and 37 H. 8, c. 9,) which are of general nature, and not local to that kingdom, shall be the rule of decision and of full force until repealed.'

Revival of Statutes. 'In cases where laws shall be repealed, and such repealing acts repealed, the first mentioned laws shall not on that account be revived.'

Mechanics' Lien. When any contract shall be made between the proprietor of a tract of land or lot, with any person for erecting or repairing a building, or machinery, or appurtenances, or for furnishing labor or materials, or any person shall have furnished materials used in the building, &c. they shall respectively have a lien on the building or machinery and the land; no such lien to continue in force more than three months from the time when payment should have been made, unless a suit shall have been commenced within that time for the purpose of enforcing the contract.

Interest. A creditor is entitled to interest at six per cent. per annum on a judgment, from the time of entering up the same until satisfied by sale of goods on execution, or otherwise; for moneys due by bond, bill, promissory note or other instrument in writing; on money lent; on money due on settlement of accounts, from the time of liquidating the same; and on money received for the use of another, and retained without his knowledge. Banks and moneyed institutions are forbidden to take over six per cent. per annum; other parties are left to agree upon the rate.

Blacks and mulattoes are not permitted to settle in the state without producing a certificate of their freedom, and also giving bonds

in $1000 not to become a charge on the public. Marriages between whites and negroes or mulattoes, are prohibited and void, and persons so married are liable to be fined, whipped not exceeding thirty lashes, and imprisoned not exceeding one year. And the magistrate or person joining such parties in marriage, is liable to a fine not less than two hundred dollars, and ineligible to any office in the state.

Conveyances. In deeds granting an estate of inheritance in fee simple, 'the words *grant, bargain, and sell,* shall be adjudged a covenant that the grantor was seized of an indefeasible estate in fee simple freed from incumbrances, done or suffered by the grantor, except for rents and services reserved.'

Internal Improvements. Kaskasia River. Two thousand dollars out of the proceeds of the sale of Vandalia lots, and the same sum out of the proceeds of the sales of the Vermillion Saline lands, and also any grant made by congress for the purpose, are appropriated to remove obstructions to the navigation of Kaskasia river, between Kaskasia and Vandalia.

Disturbance of religious worship and keeping Sunday. 'Any person who shall disturb the peace and good order of society, by labor or amusement, on the first day of the week, commonly called Sunday, shall be fined not exceeding five dollars.' Any person who shall by menace, profane, or vulgar language, or disorderly or immoral conduct, disturb the peace or good order of any congregation assembled for divine worship, shall be fined not exceeding fifty dollars. Persons keeping some other day than Sunday, as a sabbath, are excepted from this provision of the act. Persons charged with a violation of this act before a justice of the peace, *shall, if they so request, be tried by a jury of from six to eight,* to be summoned by the justice.

Sureties. The provisions on this subject are of a novel character, though we are not prepared to give an opinion as to their practical effect; they are certainly worthy of the attention of the profession and of legislators.

It is provided that if the surety in a bond, bill, or note, on which a right of action has accrued, is apprehensive that the principal debtor will become insolvent, or leave the state, and by writing requests the creditor to commence a suit on the bond, bill, or note, against the principal debtor, the surety will be discharged in case of the creditor's not so commencing a suit; this provision does not, however, extend to bonds of guardians, executors, or public officers. And in case of judgment against a surety or an obligor, he may, *on motion,* obtain judgment against the other parties to whom he has a right to resort on his having paid the debt.

Shows, Exhibitions, &c. Persons are prohibited from taking fees for shows, rope-dancing, circus riding, &c. without previous

license from the county treasurer, who may fix the sum to be paid for the licence from five to one hundred dollars.

Suits by or against the State. The auditor of public accounts may sue or be sued in behalf of, and as representing, the state. Though the act declares the state shall not be bound by a judgment rendered against it, in the auditor's name, until the same is examined by the general assembly. This is, therefore, a general provision whereby the liquidation of claims, against the state is referred to the courts.

Wills. This volume contains a long act on the subject of wills and the administration on estates, which is very full and minute in its provisions, and appears to be very ably drawn up.

'Every person aged twenty-one years if a male, or eighteen years, if a female, or upwards, and not married, being of sound mind and memory, shall have power to devise lands, tenements, and hereditaments, or personal estate; and all persons of the age of seventeen years, except married women, shall have power to dispose of personal estate by will; and a married woman may dispose of her separate estate, both real and personal, by will, in the same manner as other persons.' Act Jan. 23, 1829, s. 1.

The validity of a will cannot be contested after the expiration of five years from probate, or from the ceasing of the disability of infants, femes covert, persons absent, or non compos mentis. s. 5.

A devise to a subscribing witness to a will is void, unless the witness would have been entitled to a share of the estate, had no will been made, in which case the witness will be entitled to the devise or legacy to an amount not exceeding that to which he would have been entitled in case no will had been made; and in either case he may be compelled to appear as a witness to the execution of the will. s. 10.

Birth of a child after making a will does not revoke it; but, unless it appear to have been the testator's intention to leave nothing to such child, it will be entitled to the same share of the estate as if the testator had died intestate; to be made up by ratable deductions from the other legacies and devises. s. 12.

Illegitimate children inherit the estate of their mothers. s. 47.

Aliens may hold and inherit estate in the same manner as citizens. s. 48.

The widow of cestui qui trust is entitled to dower in an equitable estate. s. 49.

Maryland.

At the session of the General Assembly of Maryland, commenced at Annapolis, December 29, 1828, two hundred and two statutes and seventy-nine resolutions were passed. Of the statutes thirty-two are public. The following abstract includes all

which are thought to possess any interest beyond the limits of the state.

Ch. 26. *Idiots, Lunatics, and Persons non compotes mentis.* The chancellor or the county courts, upon the petition of the guardian, trustee, or committee of any idiot, &c. and his or her appearance by a guardian appointed by the chancellor or county courts, may direct a sale of the lands of such idiot, &c. if upon a hearing, it appear that it will be for his interest that the same should be sold, and may prescribe the application and investment of the money arising from the sale. All such sales must be confirmed by them before any conveyance of the property is made; and the persons empowered to sell are required to give bonds for the due execution of the trust committed to them. On the death of the idiot, &c. the money arising from the sale is to be distributed among those who would have been entitled to the land in case it had not been sold. The compensation allowed any person having charge of an idiot, &c. is not to exceed ten per cent. upon his income and expenditure.

Ch. 201. If a lunatic or insane person be arrested on any process issued by a county court or by the Baltimore city court, or one of the judges thereof, founded on oath requiring security to keep the peace, and shall fail to give such security, he shall be subject to the same proceedings that are directed against persons arrested for crimes or misdemeanors by the act passed at December session, 1826, ch. 197.

Ch. 50. *Sheriffs and other Officers.* Any sheriff or other officer, who shall have arrested any person under an attachment or *capias*, and permitted him to go at large, may again arrest such person at any time before or on the return day of the attachment or *capias*, or during the term of the court to which the same is returnable, and the second arrest shall be as available in law as the original arrest.

Ch. 64. *Board of Public Works.* The act creating a Board of Public Works is repealed by this statute.

Ch. 78. *Writs of Mandamus.* If, in any case of violation of the terms or privileges of any charter granted by the state, a writ of mandamus shall issue, and a return shall be made thereunto, the party prosecuting such writ may plead to and traverse the return, and the other party may reply, take issue, or demur; and such further proceedings may be had as in an action on the case for a false return. If judgment is given for the party suing such writ, a peremptory writ of *mandamus* shall be granted without delay.

Ch. 85, s. 6. *Licenses.* In case of the death of any person, who may have taken out a license under the act passed at December session, 1827, ch. 117, it shall be lawful for the widow, executor, or administrator, to sell under the license for the rest of the year for which the same shall have been granted.

Ch. 129. *Lotteries.* Lotteries and other games of chance are prohibited, unless granted by the legislature and approved by the lottery commissioners; or unless proposed by the commissioners on behalf of the state. The consolidation of lotteries authorized is prohibited, unless approved by the commissioners. If any person sell, or open any office for the purpose of selling tickets in any lottery unauthorized in the manner above stated, he is subject to a fine not exceeding one hundred dollars for every ticket sold, and not exceeding five hundred dollars for every day or part of a day that such office shall be opened, or to imprisonment not exceeding one year. No person (excepting the lottery commissioners in their official capacity) shall sell tickets in any lottery authorized as above stated, or open an office for the purpose, unless he shall have first obtained a license and given bond that he will conform to the laws relative to lotteries; and the several district attorneys are required to prosecute such bond, if any of its conditions are violated. Upon convictions, the license is forfeited, and the seller is forever debarred from receiving any such license within the state. Proof of the sale of the ticket or of an agreement therefor, is conclusive evidence that it was signed and issued according to its purport; and it is not necessary to prove the existence of the lottery. Provided, 'that the provisions of this act shall not be deemed applicable to *such dispositions of personal property of small value as shall be made by raffle or lot*, and which shall not be intended as evasions of the lottery system.' If any person alter or forge any ticket, with intent to defraud, or sell any forged ticket, he is subject to imprisonment not exceeding seven years. This act is to be construed largely against offenders. In case any person shall propose to draw any lottery which the commissioners shall believe to be unauthorized, they may call on the attorney-general to sue out a writ of injunction to restrain such person, until the rights of the parties can be determined.

Ch. 145. *Executors and Administrators.* This statute exempts the wearing apparel of deceased persons from exposure to public sale by the executors and administrators, except in cases where there is no widow or child, nor any person willing to pay the debts of the deceased; provided that the property of the deceased is sufficient to pay the funeral expenses; but this exemption is not to apply to watches and jewelry. The executor or administrator is required to return an inventory of the wearing apparel, and it is to be distributed among those who are entitled to the personal property of the deceased.

Ch. 148. *Auctioneers.* The sum of thirty thousand dollars, in which an auctioneer, appointed under the act of December session, 1827, ch. 111, is required to recognise with sureties, is reduced to ten thousand dollars.

Ch. 165. *Depositions.* Commissioners are to be appointed by

the county courts for the purpose of taking depositions of witnesses in civil actions, depending in these courts; which may be used only in case of the death of the witness, or on proof of the inability of the party to procure his attendance at the trial. It is also provided, that any person may have the deposition of a witness, in regard to any fact, in proving which he may conceive himself to be interested, taken before the commissioners appointed under this statute.

Ch. 174. *Trusts.* Where two or more trustees are appointed by last will, with power to the survivor to execute such trust, or to sell land or other property devised to them jointly, if any of such trustees, in writing, attested by a witness, relinquish the trust and deliver such writing to the register of wills, the right of such trustee shall therefore cease, and the remaining trustees shall be as fully empowered to act as if such trustee had died. This relinquishment is not to be construed as a release of any devise for his own use, unless it is expressly declared to be as a compensation for his services as trustee.

Ch. 199. *Misnomer.* No writ of action shall abate or be discontinued, nor any bail be discharged, because of the misnomer of the defendant, if it shall appear that the party arrested or summoned is the party intended to be sued. The court may also direct any writ, plea, or entry to be amended, and in their discretion allow or refuse costs to the defendant.

Private Acts. Eleven acts were passed for divorcing different persons. We also notice acts for the incorporation of two companies for the construction of canals; two railroad companies; two steamboat companies; a society for promoting the culture of the vine; four mining companies, of which one is for the purpose of working mines in Mexico; and a company of Freemasons; an act to exempt the property of the Grand Lodge of Maryland from taxation; an act for the incorporation of 'The Trustees of the *Particular* Baptist *Gunpowder* Church;' and an act to prevent the operation of the Escheat Laws on land now held, or that may hereafter be acquired by the four grand-daughters of Charles Carrol of Carrolton, by descent or otherwise from their grandfather.

Manufacturing Corporations. Four manufacturing companies were incorporated.

The act incorporating the Ely's Ville Manufacturing Company, for the manufacture of cotton and woollen goods, contains a provision for the establishment of a school for the instruction of the children employed in the service of the company.

It also provides, that in case of insolvency, if 'debits exceeding one half of such capital, shall at any time appear to have existed, then the stockholders shall be severally liable, in their individual capacities, to make good any deficiency in proportion to the

amount of stock held by each respectively, at the time of contracting said debits.'

The act incorporating the Baltimore Flint Glass Company provides, that no stockholder shall be liable in person or property for the debts of the company.

The acts incorporating the two other companies, one for the manufacture of shot, the other of iron, contain no provisions in regard to the personal liability of the stockholders.

INTELLIGENCE AND MISCELLANY.

Obituary notice of the Hon. Bushrod Washington, late one of the Justices of the Supreme Court of the United States.

This distinguished judge died at Philadelphia, on Saturday, November 26, 1829. The following notice of his life and character is taken from the Boston Daily Advertiser. It is understood to be from the pen of one of his associates on the bench.

The death of Mr. Justice Washington is an event, which cannot but cast a gloom upon all the real friends of our country. He was born on the 5th of June, 1762, and was of course now in the sixty-eighth year of his age. It is well known that he was the nephew, and we have a right to say the favorite nephew of President Washington. The latter bequeathed to him by his will his celebrated estate on the Potomac, Mount Vernon, which was the residence of this great patriot during the most brilliant periods of his life, the delightful retreat of his old age, the scene of his dying hours, and the spot, where by his own order his ashes now repose in the same tomb with his ancestors. To him also President Washington gave all his valuable public and private papers, as a proof of his entire confidence and attachment, and made him the active executor of his will. Such marks of respect from such a man,—the wonder of his own age, and the model for all future ages,—would alone stamp a character of high merit, and solid distinction, upon any person. They would constitute a passport to public favor, and confer an enviable rank far beyond the records of the herald's office, or the fugitive honors of a title.

It is high praise to say, that Mr. Justice Washington well deserved such confidence and distinction. Nay more. His merits went far beyond them. He was as worthy an heir as ever claimed kindred with a worthy ancestor. He was bred to the law in his native state of Virginia, and arrived at such early eminence in his profession, that as long ago as 1798 he was selected by President Adams as a Justice of the Supreme Court upon the decease of the late Judge Wilson, of Pennsylvania. For thirty-one years he has held that important station with a constantly increasing reputation and usefulness. Few men, indeed, have possessed higher qualifications for the office, either natural or acquired. Few men have left deeper traces in their judicial career of every thing, which a conscientious judge ought to propose for his ambition or his virtue, or his glory. His mind was solid, rather than brilliant; sagacious and searching, rather than quick or

eager; slow, but not torpid; steady, but not unyielding; comprehensive, and at the same time cautious; patient in inquiry, forcible in conception, clear in reasoning. He was by original temperament, mild, conciliating, and candid; and yet was remarkable for an uncompromising firmness. Of him it may be truly said, that the fear of man never fell upon him; it never entered into his thoughts, much less was it seen in his actions. In him the love of justice was the ruling passion,—it was the master-spring of all his conduct. He made it a matter of conscience to discharge every duty with scrupulous fidelity, and scrupulous zeal. It mattered not, whether the duty were small or great, witnessed by the world, or performed in private, every where the same diligence, watchfulness, and pervading sense of justice were seen. There was about him a tenderness of giving offence, and yet a fearlessness of consequences in his official character, which I scarcely know how to portray. It was a rare combination, which added much to the dignity of the bench, and made justice itself, even when most severe, soften into the moderation of mercy. It gained confidence, when it seemed least to seek it. It repressed arrogance by overawing or confounding it.

To say, that as a judge he was wise, impartial, and honest, is but to attribute to him those qualifications, without which the honors of the bench are but the means of public disgrace or contempt. His honesty was a deep vital principle, not measured out by worldly rules. His impartiality was a virtue of his nature, disciplined and instructed by constant reflection upon the infirmity and accountability of man. His wisdom was the wisdom of the law, chastened and refined and invigorated by study, guided by experience, dwelling little on theory, but constantly enlarging itself by a close survey of principles.

He was a learned judge. I do not mean by this, that every day learning, which may be gathered up by a hasty reading of books and cases. But that, which is the result of long continued, laborious services, and comprehensive studies. He read to learn, and not to quote; to digest and master, and not merely to display. He was not easily satisfied. If he was not as profound as some, he was more exact than most men. But the value of his learning was, that it was the key-stone of all his judgments. He indulged not the rash desire to fashion the law to his own views; but to follow out its precepts with a sincere good faith and simplicity. Hence he possessed the happy faculty of yielding just the proper weight to authority, neither on the one hand surrendering himself blindfold to the dictates of other judges, nor on the other hand overruling settled doctrines upon his own private notion of policy or justice.

In short, as a magistrate, he was exemplary and able, one whom all may reverence, and but few may hope to equal.

But after all, it is as a man, that those who knew him best, will most love to contemplate him. There was a daily beauty in his life, which won every heart. He was benevolent, charitable, affectionate, and liberal in the best sense of the terms. He was a Christian, full of religious sensibility, and religious humility. Attached to the Episcopal church by education and choice, he was one of its most sincere, but unostentatious friends. He was as free from bigotry, as any man; and at the same time that he claimed the right to think for himself, he admitted without reserve the same right in others. He was, therefore, indulgent even to what he deemed errors in doctrine, and abhorred all persecution for conscience' sake. But what made religion most attractive in him, and gave it occasionally even a sublime expression, was its tranquil, cheerful, unobtrusive, meek, and gentle character. There was a mingling of Christian graces in him, which showed that the habit of his thoughts was fashioned for another and a better world. Of his particular opinions on doctrinal points, it is not my intention to speak. Such as they were, though good men may differ, as to their correctness, all must agree, that they breathed the spirit of an inquisitive Christian.

He was a real lover of the Constitution of the United States; one of those who assisted in its adoption, and steadily and uniformly supported it through every change of its fortunes. He was a good old-fashioned federalist, of the school of the days of Washington. He never lost his confidence in the political principles, which he first embraced. He was always distinguished for moderation in the days of their prosperity, and for fidelity to them in the days of their adversity.

I have not said too much, then, in saying that such a man is a public loss. We are not, indeed, called to mourn over him, as one who is cut off prematurely in the vigor of manhood. He was ripe in honors, and in virtues. But the departure of such a man severs so many ties, interrupts so many delights, withdraws so many confidences, and leaves such an aching void in the hearts of friends, and such a sense of desolation among associates, that while we bow to the decree of Providence, our griefs cannot but pour themselves out in sincere lamentations. S.

Trial of a Deaf and Dumb Person.

[The following account of this curious trial is translated from 'Hitzigs, Zeitschrift für deutsche und ausländische Criminal-Rechts-Pflege. Berlin, 1828.' Some notice of this trial has already appeared in this country, but it is believed that the present is more full and detailed than any which has been hitherto published among us.]

A young man named Filleron was brought before the Court of

Assize, at Paris, in August, 1827, charged with housebreaking and petty theft. Deaf and dumb from his birth, he had never enjoyed the advantages of education, and had neither kindred, friends, nor any regular occupation. Abandoned by his parents, he was received into the Orphans' Asylum, and afterwards transferred to the Bicètre, from which he ran away. Since that time he has lived in Paris entirely isolated, without a home or any means of support, except what he received from the sympathy of some other deaf and dumb persons. M. Paulmier, the successor of De l'Epée and Sicard in the direction of the Institution for the Deaf and Dumb at Paris, was employed as interpreter, and it was surprising, with what ease he made himself understood by the prisoner, without the assistance of the signs adopted in the Institution. He also understood and explained the meaning of the prisoner with great facility. Filleron entered the hall with a wrinkled brow and a vacant countenance, and having thrown a careless glance around the assembly, he remained motionless.

The president, with the assistance of M. Paulmier, asked him his name. This is the only word of which he knows the letters. He answered by signs that he was called Filleron, and signified with his fingers that he was nineteen years of age. The president desired that he might be asked where he was born. M. Paulmier, by motions and gestures, endeavored to convey to him the idea of a child in the cradle and at the breast. Filleron made signs that he had come from a great distance, and that his father was a mason; and raised and lowered his hands several times to imitate the motion of the waves. M. Paulmier explained his meaning to be, that he was born on the sea-coast. M. Paulmier then inquired of him his place of abode, by laying his head on his hand as if asleep. For answer, Filleron scratched his hand as if afflicted with a certain cutaneous disorder; by this, M. Paulmier understood him to mean, that he lived in the Bicètre. The bill of complaint was then read, which charged, that Filleron, (after he had run away from the Bicètre and had come to Paris,) by creeping under a door and breaking a pane of glass, had effected an entrance into the Orphans' Asylum in which he was educated, and had stolen the clothes of one of the young men; that three days after he again entered the Asylum by jumping over the wall, and after having eaten in the kitchen, had purloined a coal-scuttle, three copper stew-pans, and an apron. These articles were delivered by him to one Letertre, a well known deaf and dumb cook, who invites customers by blowing a trumpet. Letertre had deposited the articles with a wine merchant, who, having his suspicions awakened, caused Filleron to be arrested. The president desired M. Paulmier to make Filleron understand that he was accused of theft and housebreaking. M. Paulmier imitated the motions of a person who takes away a coat and runs

off; he then pointed with his finger to the accused and to the officers of the court. Filleron made a sign in the affirmative. M. Paulmier repeated his gestures, and at the same time imitated the movements of a cook, who shakes a stew-pan over the fire. Filleron signified, by lively gestures, that he understood him, repeated the motions, and expressed with his fingers, that he had stolen three stew-pans and a utensil managed with both hands. He was then asked how he had effected an entrance into the Asylum. He now by attitudes and motions signified, that he had crept under a door; broken a pane of glass with his knife, and having passed through a long passage, got into the kitchen; that having eaten, he had taken three stew-pans from the nails on which they were hung; and, after wrapping them in a cloth, had made his escape.

President. Ask him where he was educated.

M. Paulmier lowered his hands, in order to convey the idea of a small child, and raised them gradually, to represent its growth. Filleron placed his hand on the collar of his jacket, to signify that he was educated in the Orphans' Asylum, where the children wear grey jackets with red collars.

President. He was sent away from the Asylum for bad conduct; ask him why he went away.

Filleron answered this question, by signifying that he had assumed a sulky mien. He then scratched his hand, to express the idea, that he had been sent to the Bicêtre.

President. Ask him if he has been employed as a tailor.

M. Paulmier imitated the motions of a person who is sewing. Filleron made a sign in the negative, and folded his arms, in order to signify that had no occupation. He then stretched them out, as if he were pushing violently; by this he intended to express the idea, that he had worked at a well, and had turned the wheel.

President. Ask him why he ran away the second time.

Filleron expressed, by very intelligible signs, that he was tired and had been beaten. He then made a wry face, and turned his pocket wrong side outwards, to signify that he had not been well paid.

President. How has he lived since he ran away from the Bicêtre?

M. Paulmier drew a large circle, to represent the city of Paris, and imitated the motions of a man who is eating and sleeping. Filleron understood this at once, and placed himself in an attitude as if he were blowing a trumpet, and then pretended to eat, to signify that he had lived with Letertre.

President. Ask him, whether some days previous to his arrest he did not give five francs to one of the orphan boys who was sweeping before the gate of the Orphans' Asylum.

M. Paulmier showed him five francs, and endeavored to con-

vey to him the idea of a boy who is sweeping, to whom something is given. Filleron made a sign in the affirmative, and expressed by signs, that he had obtained the money by working at the well.

President. Ask him why he committed the theft.

It was very difficult for M. Paulmier to make this understood. When Filleron at last comprehended his meaning, he expressed by signs, that he was large, subject to hunger and thirst, and that he must have a pinch of snuff.

President. Ask him if he knows that it is unlawful to steal.

M. Paulmier acted as if he would have Filleron to take away his jacket, pointed to the gens-d'armes and the officers of the court, repeated the same signs pointing to himself, and then placed himself in a position, as if he were seizing a thief, and binding his hands. To all this, Filleron answered by imitating the motions of a man who acts eagerly, to signify that he was forced by hunger to steal.

According to the statement of the Commissary of Police, before whom Filleron was first brought, when the stolen clothes which he had on were taken from him, he evinced signs of the greatest despair, and attempted to seize the sabre of one of the gens-d'armes; and it became necessary to bind him. He then made signs as if in mockery, and as if he wished to throw himself into the water, or cut his throat. After this, he bent his head down and wept bitterly, and then remained motionless, and as if sunk in the deepest despondency.

To the question, whether he had broken into the Asylum, Filleron answered by signs, that he had broken a pane of glass; but that it had been broken before, and he earnestly insisted on this last circumstance. When the stolen articles were shown to him, he recognised them as such, and made signs that he was hungry. M. Paulmier asked him if he was sorry. Filleron again expressed by signs, that he was hungry and had nothing to eat; and then placed himself in an attitude, as if some one were pushing him and pointing out to him some object. M. Paulmier explained his meaning to be that he was instigated by some other deaf and dumb persons to commit the theft. On motion of the Advocat-Général he was asked, whether he had not been already punished in the Asylum for theft. To this he answered by signs, that he was then very small, that he was allowed but a very small portion of bread and was hungry. He then assumed the fixed posture of a soldier, to signify that he had been punished in that manner.

President. Ask him if he has any idea of religion.

M. Paulmier pointed to the heavens, placed himself in an attitude of supplication, and struck himself on the breast, in sign of guilt. Filleron did not appear to understand him; but signified that it had been attempted to teach him to read and write. M.

Magni, the Director of the Orphans' Asylum, stated that he was convinced that Filleron could not distinguish between good and evil.

The second witness was the deaf and dumb cook. He was a pupil of the Abbé de l'Epée, and could understand and make himself understood with greater facility. He appeared to be in high spirits, saluted the court with great civility, and at the order of M. Paulmier raised his hand with a very significant expression, denoting that he would open his whole heart. An inarticulate sound, to which he gave utterance, resembled the French word *oui*. He expressed by signs the letters of his name, Antoine Alexandre Letertre, and that he was forty-seven years of age; he then placed himself in an attitude as if he were blowing a trumpet, and laughed heartily. He expressed, by very intelligible signs, that he had taken the stolen articles, and that Filleron had informed him that he had received them for the purpose of getting them tinned over. He manifested great abhorrence, placed one hand on his heart, and covered his eyes with the other, and then pretended to push back the stew-pans that were lying on the table, with violence, to signify that he did not know they had been stolen. He then imitated the movements of a man who is seized and bound to a post. M. Paulmier declared, that the honest Letertre well understood that theft was unlawful, and that its consequences were imprisonment and exposure in the pillory.

Here arose a very lively pantomime between Letertre and Filleron. M. Paulmier explained, that Letertre asserted in contradiction of Filleron, that the latter had said, he had received the stew-pans for the purpose of getting them tinned over.

President. Ask the witness if Filleron has ever before delivered to him stolen goods. Letertre denied this, and made signs that he was honest, had a good heart, and pushed the stolen articles from him.

The other witnesses had nothing of importance to state.

The Avocat-Général contended, that notwithstanding the compassion we may feel for the condition of the deaf and dumb, the law must take its course; that there were deaf and dumb persons, possessing intelligence and discernment; and that they were to be judged according to the measure of their understanding. In conclusion, he insisted that Filleron was capable of distinguishing between good and evil; that he had acted with intelligence, and must therefore be pronounced guilty.

The counsel for the accused, in the defence assumed the position, that a person, deaf and dumb from his birth, who has never received any education, is not amenable to the law. In this condition he cannot form any ideas, for there is wanting to him *words*, the elements of all ideas. Even if, by a kind of inspiration and by observation, he has acquired a knowledge of the

consequences of evil actions, still it would not be possible for him to choose, with a clear discrimination, between an action forced upon him by a state of extreme necessity, like that of the prisoner, and a forbearance from that action for fear of its consequences. He has not that self-control, that *freedom of will*, upon which all liability to punishment rests. His actions are not to be measured by the standard of morality. But suppose this position to be untenable, he is not subject to punishment, according to the well established rule of law, *lex non obligat nisi promulgata.* However great may be his inclination, he cannot obtain a knowledge of the law; and the apostle Paul says, 'I had not known sin, but by the law; for I had not known lust except the law had said, "Thou shalt not covet."' Filleron has indeed seen punishments, executions, and gens-d'armes; but gens-d'armes are not the flesh become law. Were the seeing such objects as these sufficient to create a liability to punishment, a criminal code of laws would be useless, and it would only be necessary to ascertain whether the person accused has ever passed by the gallows.

Filleron was acquitted. He received an earnest admonition from M. Paulmier, which appeared to affect him.

Whether a minor is to be joined as defendant in a suit on a contract to which he is a party.

The following case at *nisi prius* is taken from the London Atlas of June 7, 1829. The name of the judge is not given in the report of the case.

The defendants were farmers, father and son, and carried on their business jointly. Plaintiff had supplied them with timber and in his bills had always entered them as partners. The son was a minor.

Having occasion to sue them on a bill for timber, the plaintiff wished to be advised whether he should proceed against the father alone, or if he must proceed against both and leave it to the son to plead infancy, or how otherwise.

Opinion. I am clearly of opinion the plaintiff must sue the father alone, as the son being an infant is not liable and ought not to be joined. 1 Stark. 26; 5 B. & A. 127. And this is the only plan to be adopted; because if both were sued and the infant should plead non-age, the plaintiff could not enter *nolle prosequi* as to him, but would have to discontinue the action and commence *de novo* against the other party separately. 3 Esp. 76. And if the non-joinder should be pleaded in abatement, the infancy may be shown in replication.

LORD TENTERDEN,

Lord Chief Justice of the Court of King's Bench.

[As a knowledge of the character of a judge throws some light

upon his decisions, and as the reports of cases in the English court of King's bench are as familiarly quoted in this country as those of our own courts, we give our readers the following sketch of the present chief justice of that court, taken from a London paper.]

Some one of the sages of our law, we believe Lord Kenyon himself, without the advantage of patrimony, at least to any great extent, remarked that there was one indispensable requisite to success in the profession of the bar,—that was, to be born without a shilling. The justness of this remark as a general proposition, we certainly take leave to deny, though, no doubt, there are particular and splendid instances in which success has been achieved by those on whom fortune had in earlier life most inauspiciously frowned. Among the number of these latter at present living, the chancellor, (Lord Lyndhurst,) the ex-chancellor Eldon, the Lords Stowell and Plunkett, and Sir John Leach, as well as the subject of this sketch, may be enumerated.

The origin of Charles Abbott, now Lord Tenterden, is indeed more humble than most of his predecessors. He is the son of an honest and respectable barber of Canterbury, (as we have been credibly informed,) in which town he was born about the year 1760. The occupation of the father of Lord Tenterden brought him, as may be supposed, into frequent contact with the resident prebends and canons of the cathedral; and the honest conduct and respectable appearance of the old man, joined to his respectful demeanor, contributed to render him and his family general favorites of the domestic circle; however, the present Lord Tenterden came more under the notice of the clergy, and they looked on him thus early with a favoring and friendly eye.

At a very early age, the future chief justice of all England became a scholar at the free school of Canterbury, which is open, as a matter of right, to the sons of all the burgesses. At this school, young Abbott acquired the reputation of being studious and well behaved; and after a short period, his progress in learning was such that he was appointed tutor to a young gentleman of the name of Thurlow, an illegitimate son of Chancellor Thurlow. When Thurlow went home for the holidays, Mr. Abbott always accompanied him, and the father of the young scholar had thus an opportunity afforded him of becoming more intimately acquainted with the character of his son's tutor. The result of this knowledge, on the part of his lordship, was highly favorable to Mr. Abbott, who acquired and deserved the esteem and friendship of his powerful patron. As a consequence of his good opinion, and through the instrumentality and assistance of Lord Thurlow, Mr. Abbott was entered at Corpus Christi College, Oxford, in the year 1781. About six years previously, Lord Eldon and

his brother Lord Stowell, had become members of the University College; and, when Mr. Abbott was entered of Corpus Christi, the present Lord Stowell was tutor of that College. Thus at the same period, there were three men at the University, one a scholar holding an exhibition not exceeding £16 per annum, and the others fellows with an income not exceeding £120 annually, who were destined to become the heads of the legal profession in England—the one as Chancellor, the other as Chief Justice, and the third as Judge of the Admiralty and Prerogative Courts. The tradition of the University has recorded that there were not at that or any other period within its walls, three more simple and unassuming characters.

In the University of Oxford, there were, at this time, two prizes of twenty pounds each, given annually, for the best composition in Latin verse and English prose; there has since been added a third, by Lord Grenville, for Latin prose. The first of these prizes, for the best composition in Latin verse, upon a subject chosen by the University, is confined to those members who are not of more than four years standing.

In the year 1784, the subject chosen was 'Globus Ærostaticus.' This prize was gained by Mr. Abbott. In the year 1786, the thesis for composition in English prose, 'The Use and Abuse of Satire,' and this prize was likewise gained by him. Mr. Abbott thus established his character at the University for diligence and scholarship, and at once justified the liberal patronage of his friends, and gained a reputation which was eventually of the greatest service to him in future life. When, after an interval of thirty years, Lord Eldon, as Chancellor, had to select a proper man to fill a judicial vacancy, he remembered Mr. Abbott and the reputation he had acquired at Oxford. Perhaps the Chancellor valued this kind of fame so much more highly, as he himself had been a successful combatant in the same lists. In the year 1771, fifteen years before Mr. Abbott gained his prize for the best composition in Latin verse, Mr. Scott, afterwards Lord Eldon, obtained the prize for his English essay on the 'Uses and Abuses of Foreign Travel.' In the usual time, Mr. Abbott, like Lord Stowell, became a tutor of his college—a situation of more emolument than a mere fellowship. Whilst in this situation, one of the sons of Mr. Justice Buller became his pupil, and the learned judge was so pleased with the progress of his son, and so convinced of the talents of his instructer, that he recommended Mr. Abbott, to quit the University, and take his chance at the bar. With this recommendation Mr. Abbott, fortunately for himself, complied; resigning, therefore, his tutorship, but retaining the place of fellow, he journeyed up to London, entered himself as a law-student, and commenced the study of special pleading.

Of this science—if science it can be called, all confused and chaotic as it is—Mr. Abbott, like his patron Buller, soon became

a master, and having obtained the reputation of a safe and diligent draftsman, and thereby procured a character and connexion, he was, after a short interval, called to the bar.

Whilst at the bar, Mr. Abbott compiled his celebrated work upon shipping, which he dedicated to Lord Eldon, at that time Lord Chancellor. The work is very strongly marked with that sense and diligent reading which have always characterised the author. The method is original, and the distribution and style are singularly plain and unaffected. Upon the whole, it is the best law book of Mr. Abbott's time, and very deservedly procured him the patronage both of the Chancellor and Lord Ellenborough. Lord Ellenborough endeavored, but in vain, to push him into greater business; but Mr. Abbott was better estimated by the bar than by the attorneys, and never attained any considerable degree of practice. Lord Eldon resolved to assist him more effectually, and probably bore his name in mind, that he might promote him as occasion served.

This opportunity at length arose. In the year 1816, Mr. Justice Heath died, and a vacancy occurred in the Common Pleas. It was immediately filled up with the name of Mr. Abbott. Upon taking his place, he was almost unknown in the court, and his elevation excited a very general surprise. It was thought that the bar of the Common Pleas might have afforded a lawyer more adequate to the situation, and that the profession in that Court was not well treated in having a man who had not practised as a Sergeant thrust over their heads; but the murmurings of professional jealousy and discontent were soon stilled by the correct legal learning and superior scholastic attainments of Mr. Abbott.

In his performance of the duties of the office of a Justice in the Common Pleas, Mr. Abbott displayed that degree of useful knowledge for which the Lord Chancellor had given him credit. He certainly gave so much satisfaction to this head of the law, that, when the death of Sir Simon Le Blanc followed that of Mr. Justice Heath, and opened a place in the Court of King's Bench, the Chancellor again advanced him. This advancement was attended with two advantages to Mr. Abbott: it was not only promotion from an inferior to a higher court, but a removal to a tribunal more congenial with his habits and manners. The rough and boisterous tone of the leading Sergeants in the Common Pleas was but ill suited to the grave and decorous deportment of the Chief Justice.

In the Court of King's Bench, Sir Charles Abbott had a still better opportunity for displaying his talents for business, his competency, his prudence, and his aversion to all innovation upon the received practice of the court and its officers. The frequent indisposition of Lord Ellenborough afforded him these occasions, and his conduct gave the fullest satisfaction to the Chancellor. Accordingly, the death of Lord Ellenborough no sooner afforded

a third opportunity for his further advancement, than he was made Chief Justice of the King's Bench. Thus, in a space of time not much exceeding four years, a man of good habits of business and diligent reading, but in no respect of a capacity more than ordinary, ascended from the most moderate practice at the bar to the eminent office and dignity of Chief Justice of England, and thus occupied a seat which from the beginning of the last century to the present, had been successively filled by some of the ablest men in the English annals.

As a Judge, the genius of Mr. Abbott is rather technical than general or comprehensive. He has not the boldness to originate or the dexterity to amend; but he administers the laws as they exist with singular precision and despatch. Grasp of mind he appears to have none; but in familiarly talking out a cause with Sir James Scarlett, he appears to be a great master of detail, and to be sufficiently imbued with a logical and generalising spirit.

Moreover, no Judge of the present, nor indeed of the past times, has contrived to get through the enormous business of his court with more celerity and effect. This disposition on the part of the first authority in the court, while it has tended to repress any thing approaching to eloquence or discursiveness, has, nevertheless, contributed to the introduction of a more business-like system, by which, perhaps, the great mass of the suitors have been more materially benefited.

JUDGES IN THE UNITED STATES.

We have intended, ever since our journal was first established, to give an account of the judicial officers of the United States and of the several States, but have never been able to obtain complete lists of them. The following are chiefly taken from the American Almanac.

JUDICIARY OF THE UNITED STATES.

SUPREME COURT.

Names of the Judges, Attorney-General, Clerk, Marshal, and Reporter, their Places of Residence, and their Salaries.

Names.		Residence.	Salary.
John Marshall, Chief Justice		Richmond, Va.	$ 5,000
William Johnson, Associate Justice		Charleston, S. C.	4,500
Gabriel Duvall	"	Marietta, Md.	4,500
Joseph Story	"	Cambridge, Mass.	4,500
Smith Thompson	"	New York.	4,500
John McLean	"	Ohio.	4,500
Henry Baldwin	"	Pennsylvania.	4,500
John M. Berrien, Attorney-General		Washington.	3,500
William T. Carroll, Clerk		Washington.	Fees.
Tench Ringgold, Marshal		Washington.	"
Richard Peters, Reporter		Philadelphia.	"

DISTRICT COURTS.

Names of the Judges, Attorneys, and Marshals, and the Amount of their Salary.

States.	*Judges.*	*Salary.*	*Attorneys.*	*Salary.*	*Marshals.*	*Salary.*
Maine	Ashur Ware	$1,000	E. Shepley	$200 & fees	B. Green	Fees
New Hampshire	John S. Sherburne	"	S. Cushman	200 & fees	P. Cogswell	$200 & fees
Massachusetts	John Davis	1,600	A. Dunlap	Fees	S. D. Harris	Fees
Connecticut	William Bristol	1,000	A. Child	200 & fees	James Mitchell	Fees
Rhode Island	John Pitman	"	R. W. Green	" & fees	B. Anthony	Fees
Vermont	Elijah Paine	800	W. A. Griswold	" & fees	J. Edson	200 & fees
New York						
Northern District	Alfred Conklin	1,600	Samuel Beardsley	200 & fees	J. W. Livingston	200 & fees
Southern District	Samuel R. Betts	"	I. A. Hamilton	" & fees	T. Morris	Fees
New Jersey	William Russell	1,200	G. D. Wall	" & fees	Z. Drake	Fees
Pennsylvania						
Eastern District	Joseph Hopkinson	1,600	G. M. Dallas	Fees	John Conard	Fees
Western District	William Wilkins	"	A. Brackenridge	200 & fees	J. M. Davis	200 & fees
Delaware	Willard Hall	1,200	G. Read, Jr.	" & fees	J. Brobson	" & fees
Maryland	Elias Glenn	1,600	N. Williams	Fees	T. Finley	Fees
Virginia						
Eastern District	George Hay	1,800	R. Stannard	200 & fees	J. Pegrams	Fees
Western District	Alexander Caldwell	1,000	E. S. Duncan	" & fees	B. Reeder	200 & fees
North Carolina	H. Potter	1,500	T. P. Devereaux	" & fees	B. Daniels	Fees
South Carolina	Thomas Lee	1,800	John Gadsden	Fees	M. A. Warren	Fees
Georgia	Jeremiah Cuyler	1,600	M. H. McAllister	200 & fees	J. H. Morel	Fees

Alabama							
Southern District	William Crawford	1,500	Henry Hitchcock	200	& fees	F. W. Armstrong	Fees
Northern District	William Crawford	"	H. I. Thornton	"	& fees	F. W. Armstrong	200 & fees
Mississippi	Peter Randolph	2,000	F. Houston	"	& fees	J. H. Norton	" & fees
Louisiana							
Eastern District	Samuel H. Harper		John W. Smith			J. Nicholson	
Western District	Samuel H. Harper		Benjamin F. Lenton			F. Dupanier	
Tennessee							
Eastern District	John McNairy	1,500	J. A. McKinney			William Lyon	
Western District	John McNairy	"	James Collingworth	200	& fees	R. Purdy	200 & fees
Kentucky	John Boyle	"	J. S. Smith			J. M. McCalla	" & fees
Ohio	John W. Campbell	1,000	Samuel Herrick	200	& fees	J. Patterson	" & fees
Indiana	Benjamin Parke	"	Samuel Judah	"	& fees	William Marshall	" & fees
Illinois	Nathaniel Pope		Samuel McRoberts			Charles Slade	
Missouri	James H. Peck	1,200	Beverly Allen			J. Simmonds, jr.	200 & fees
TERRITORIES.							
Arkansas	J. W. Bates	1,200					
"	Benjamin Johnson	"					
"	Thomas P. Eskridge	"					
"	William Trimble	"	Samuel C. Roane	200	& fees	G. W. Scott	200 & fees
Michigan	William Woodbridge	"					
"	James Witherill	"					
"	Solomon Sibley	"					
"	Henry Chipman	"					
"	James D. Doty	"	Daniel Le Roy			Thomas Rowland	
East Florida	Joseph L. Smith	1,500	Thomas Douglass			Waters Smith	
Middle Florida	Thomas Randall	"	James G. Ringgold	200	& fees	Alexander Adair	200 & fees
West Florida	H. M. Brackenridge	"	B. D. Wright			James W. Exum	
Southern Florida	James Webb		J. G. Stower			H. Wilson	
District of Columbia	William Cranch	2,700					
"	Buckner Thruston	2,500					
"	James S. Morsel	"	Thomas Swann	Fees		Tench Ringgold	Fees

MAINE.

	Salary.
Supreme Court.—Prentiss Mellen, Chief Justice	1,800
Nathan Weston, jr. Associate Justice	1,500
Albion K. Parris "	1,500
Common Pleas.—Ezekiel Whitman, Chief Justice	1,200
Samuel E. Smith, Associate Justice	1,200
David Perham "	1,200

NEW HAMPSHIRE.

Supreme Court.—William M. Richardson, Chief Justice	1,400
Samuel Green, Associate Justice	1,200
John Harris, "	1,200
Common Pleas.—Arthur Livermore, Chief Justice	1,200
Josiah Butler, Associate Justice	1,000
Timothy Farrar "	1,000

VERMONT.

The Judges of the Supreme Court, which is a court for the determination of questions of law, and petitions, and other matters not triable by jury, and has general chancery powers and jurisdiction, are five in number, and are chosen annually by the Legislature. Including an allowance of $125 per annum to each judge, for preparing reports of the decisions of the Supreme Court, to be published by the State, the salaries of the judges are $1175 each.

Richard Skinner, Chief Justice.

Samuel Prentiss,
Titus Hutchinson,
Bates Turner,
Ephraim Paddock,
} Assistant Justices.

The Legislature appoints annually two assistant judges in each county, who, with *one* judge of the Supreme Court, compose the County Court. The County Court has original exclusive jurisdiction in cases triable by jury, where the matter or thing in question exceeds the value of one hundred dollars; and in some cases where smaller damages are claimed. The assistant judges of this court have no salaries, and their fees vary probably from $50 to $250 per annum, according to the business done in the respective County Courts. There are thirteen counties.

MASSACHUSETTS.

Supreme Court.—Isaac Parker, Chief Justice	$3,500
Samuel Putnam, Associate	3,000
Samuel S. Wilde "	3,000
Marcus Morton "	3,000

		Salary.
Common Pleas.—Artemas Ward, Chief Justice		2,100
Solomon Strong, Associate		1,800
John M. Williams "		1,800
David Cummins "		1,800
Municipal Court, Boston.—Peter O. Thacher, Judge		1,200

RHODE ISLAND.

Supreme Court.—Samuel Eddy, Chief Justice		$650
Charles Brayton, Samuel Randall,	Associate, each	550

The Judges receive also an entry of $3 on Insolvent Petitions.

In each county is a Court of Common Pleas consisting of five Judges each, making twenty-five in the whole, besides the Judges of the Supreme Court.

CONNECTICUT.

Supreme Court.—Stephen T. Hosmer, Chief Justice		$1,100
John T. Peters, Jeremiah G. Brainard, James Lanman, David Dagget,	Associate, each	1,050

County Courts.—The Judges are appointed annually by the Legislature. Pay of the Chief Judge, $3 50 a day; and of the Associate Judges $3 a day, during the Session of the Court, and nine cents a mile for travel.

NEW YORK.

Reuben A. Walworth, Chancellor		$2,000
Supreme Court.—John Savage,	Chief Justice,	$2,000 each.
Jacob Sutherland,	Associate,	
William L. Marcy,	"	

Circuit Court.—Eight Judges. Salary, $1,250 each.

1 Ogden Edwards,	5 Nathan Williams,
2 James Emott,	6 Samuel Nelson,
3 William A. Duer,	7 Daniel Mosely,
4 Esek Cowen,	8 John Birdsall.

The term of service of all the above Judges expires at the age of sixty years.

There are fifty-five counties in the State, in each of which (except in New York) there are five judges of the County Courts. No salary paid by the State. Term of service, 5 years.

Superior Court, New York.

Samuel Jones, Josiah Ogden, Thomas I. Oakley, } Judges. Term of service five years.

MARYLAND.

		Salary.
Chancellor, Theodoric Bland		$3,600
Court of Appeals.—John Buchanan, Chief Judge		2,200
Richard Tilghman Earle,	Associate	2,200
William Bond Martin,	"	2,200
Stevenson Archer,	" (Baltimore)	3,000
Thomas Beale Dorsey,	"	2,200
John Stephen,	"	2,200

County Courts.—The State is divided into six judicial districts, for each of which there are three judges. Each court is constituted of one of the Judges of the Court of Appeals, and two Associates. The salary of these county Associate Judges is $ 1,400 each, except in Baltimore district, where the Associates are paid $ 2,200 each.

First Judicial District.—John Stephen, Chief Judge.
Edmund Key, } Associate Judges.
John Rowby Plater, }

Second Judicial District.—Richard Tilghman Earle, Chief Judge,
Lemuel Purnell, } Associate Judges.
Philemon B. Hopper, }

Third Judicial District.—Thomas Beale Dorsey, Chief Judge,
Charles J. Kilgour, } Associate Judges.
Thomas H. Wilkinson, }

Fourth Judicial District.—William Bond Martin, Chief Judge,
Asa Spence, } Associate Judges.
William Tingle, }

Fifth Judicial District.—John Buchanan, Chief Judge,
Abraham Shriver, } Associate Judges.
Thomas Buchanan, }

Sixth Judicial District.—Stevenson Archer, Chief Judge,
Charles Wallace Hanson, } Associate Judges.
Thomas Kell, }

Baltimore City Court.—Nicholas Brice, Chief Judge		$2,400
William M'Mechan,	Associate	1,500
Alexander Nesbit,	"	1,500

NORTH CAROLINA.

Supreme Court.—John Hall,	Judge,	$2,500
Leonard Henderson,	"	2,500
John D. T———,	"	2,500

Superior Court.—The state is divided into six circuits, in which the Court is held half yearly in the sixty-four counties; so that one judge attends ten or eleven counties, which occupies him so many weeks. The judges are paid $ 90 for every Court they

attend. Their names are William Norwood, J. J. Daniel, John R. Donnell, James Martin, Robert Strange, and W. P. Margum.

GEORGIA.

Superior Court.—There are eight Judges of the Superior Court, and each presides in a Circuit, making eight Circuits in the whole.

1. Northern	Circuit,	William H. Crawford,	Salary,	$2,100
2. Southern	"	Thaddeus G. Holt,	"	2,100
3. Eastern	"	William Law,	"	2,100
4. Western	"	Augustus S. Clayton,	"	2,100
5. Oakmulgee	"	Thomas W. Cobb,	"	2,100
6. Flint	"	Christopher B. Strong,	"	2,100
7. Middle	"	William W. Holt,	"	2,100
8. Chatahooche	"	Walter T. Colquitt,	"	2,100

Inferior Court.—There is one in each county, each composed of five Justices elected by the people. They have no salaries, and possess the powers of courts of Probate.

OHIO.

			Salary.
Supreme Court.—	Calvin Pease,	Chief Justice	$1,200
	Peter Hitchcock,	Associate	1,200
	Joshua Collett	"	1,200
	Gustavus Swan	"	1,200

Circuit Court.—Presiding Judges in each Circuit.

	Salary.		Salary.
1. George B. Holt	$1,000	6. George Smith	$1,000
2. Frederick Grimkè	1,000	7. Ebenezer Lane	1,000
3. George Todd	1,000	8. Thomas Irwin	1,000
4. Alexander Harper	1,000	9. George P. Torrence	1,000
5. Jeremiah H. Halsek	1,000		

There are three Associate Judges in each county, who receive $2 a day, while the court is in session. The judges of both courts are elected every seven years. The number of Associate Judges is about 200.

MISSOURI.

				Salary.
Supreme Court.—	Mathias M'Girke,	Judge	.	$1100
	George Thompkins	"	.	1100
	Robert Wash	"	.	1100
Circuit Court.—	David Todd	"	.	1000
	N. B. Tucker	"	.	1000
	William C. Carr	"	.	1000
	John D. Cook	"	.	1000

ILLINOIS.

		Salary.
Supreme Court.—William Wilson, Chief Justice		$ 1000
Thomas C. Brown, Associate Justice		
Theophilus W. Smith	" "	
Samuel D. Lockwood	" "	

INDIANA.

		Salary.
Supreme Court.—James Scott, Chief Justice		$ 800
Isaac Blachford, Associate Justice		700
Jesse L. Holman	" "	700

This state is divided into five circuits, in each of which a circuit court is holden semi-annually in each county before a president or circuit judge, and two county or associate judges. The following are the names of the Presidents.

First Circuit.—John R. Porter.
Second " John Ross.
Third " Miles C. Eggleston.
Fourth " James R. E. Goodlet.

The New Regulations of the Inner Temple.

The London Observer of July 26, 1829, gives the following account of some proposed regulations of the Inner Temple. It is interesting in this country, from its giving some idea of the actual situation of the most important branch of the legal profession in England; and also on account of the biographical facts contained in it.

'For some years there has been a disposition evinced to restrict the admissibility to the bar, on the ground that the great and growing increase of the number of barristers is attended with injurious effects on the character of the profession. The desire of vesting a power of exclusion in the Benchers is known to have prevailed more strongly among those of the Inner Temple than in any other inn of Court; and there it appears this power is first to be assumed. The intended restrictions, which are said to have originated with the Attorney-General, have not yet been formally promulgated; but they are so far established that they have been communicated to the officers of the Society, and by them, on inquiry, are stated to the Members. By these new regulations, no person can be admitted a member, with the view of being called to the bar, until he has undergone a previous examination as to his knowledge of the Greek and Latin classics, and of Literature in general. Before he can be called to the bar, he must undergo a second examination as to his classical and literary knowledge, and also as to his knowledge of law, by Examiners to be appointed for that purpose. If he receive a certificate of pro-

ficiency from these Examiners he must still undergo a final examination before the Benchers themselves; and unless they are satisfied in these respects, and as to his moral character, his property, and any other circumstances into which they may choose to inquire, they will not call him to the bar. These regulations are to take effect immediately, without any exception in favor of the present members. At present no practising attorney can be called to the bar until his name shall have been taken off for two years from the rolls of the courts of Westminster, and no articled clerk can be called till two years after his articles shall have been cancelled. A new order will be issued, by which no solicitor, attorney, or articled clerk whatever, will be admitted a member, to be called to the bar, until three years after his name shall have been taken from the rolls, or his articles cancelled. It is said to be in contemplation to prevent special pleaders from practising below the bar, or to prevent those who choose that course from being called to the bar afterwards. It is said also that a schedule of his property will be required from every member before his call to the bar, and that £400 per annum will be his requisite qualification. The Examiners, who will be four in number, will be barristers; those at present named for the Inner Temple, are Mr. E. H. Anderson, Mr. Richards, and Mr. Scarlett, the son of the Attorney-General. It is expected that when these regulations are formally established in this Society, they will be extended to the other Societies. The special pleaders and the attorneys complain loudly at the proposed restrictions, which they contend will have the effect of rendering the bar a close monopoly, and of depriving it of the eloquence, talent, and energy which now distinguish it, and which result altogether from the facility of admission, and the consequent rivalry of a numerous body of competitors. The whole business of pleading will be thrown at once into the hands of the barristers, many of whom, it is well known, are utterly ignorant both of the science and practice of pleading. The pleaders take silver fees, but the barristers must take nothing less valuable than gold; half a crown fees are not yet unknown among the pleaders; but the barristers can take nothing less than half a guinea. The cost of advice will be raised to the client, and to such an extent that the already intolerable expenses of law will be increased three or four fold. These are the objections urged to these restrictions on free competition, the very object which, in every other profession and pursuit, it is the policy of the country to encourage and extend. The evil that will result from the power of exclusion is illustrated by the list of great men, the light and glory of the legal profession, who, beginning their career with Lord Thurlow's talisman of success, 'parts and poverty,' have risen to the highest honors of the law. The late Lord Chancellor, and his brother, the greatest civilian of the age, Lord

Stowell, are the sons of a coal-fitter at Newcastle. Lord Stowell supported himself at college as a private tutor; and Lord Eldon was originally bred an attorney, and was prompted by private reasons to enter himself for the bar. He was indebted to Mr. Sinclair, the recorder of York, for the means of going circuit, for some time, and has often related himself anecdotes of the difficulty he experienced in getting into practice in chancery. There is a well known anecdote which he used to repeat pathetically, of his being cheated by a fawning Solicitor out of the first fee he earned at the bar, by signing a bill, on a promise that he should receive the guinea immediately. The Lord Chief Justice of the King's Bench is the son of a hair-dresser at Canterbury, and was educated at the Grammar School, which is a charitable foundation. The present Lord Chancellor is the son of Mr. Copley, the painter, and certainly had not £400 a year when he was called to the bar. The Chief Justice of the Common Pleas is the son of a country attorney. The Solicitor-General is also a hair-dresser's son, and was clerk to Mr. Groom, the late Lord Londonderry's Solicitor. His admission to the bar was opposed on that very ground, but granted by the exertions of Mr. Hargrave, who supported it with reference to the talents Mr. Sugden had displayed in a legal work he had published while a student. Mr. Serjeant Wilde was, within a few years, an attorney in the city, in partnership with his brother, who has had so long a contest with Mr. Winchester, for the Admiral's gown of Vintry Ward. Of the King's Counsel, Mr. John Williams is the son of an attorney in Cheshire, and Mr. Frederick Pollock of a saddler at Charing Cross; Mr. Bickersteth was lately a house surgeon and accoucheur in the family of Lord Clifford; Mr. Gurney's mother kept a bookseller's shop in Holborn; Mr. Campbell was a reporter on a morning paper, as also was Mr. Serjeant Spankie, before he went to India, and Mr. Stephen, the Master in Chancery, who did himself honor by resisting an attempt to prevent the call of a reporter, avowing that he himself could never have gone to the bar, if he had not supported himself in that manner. Five colonial Judges have been reporters, and some of the most rising barristers at present were engaged in the same occupation.

These are the living instances of the advantages of free admission; and there are abundant examples among those who are departed; Lord Kenyon was an attorney's clerk; Lord Hardwick, first a peasant, and afterwards an attorney's writer and office boy; Lord Thurlow used to boast of his own self elevation; Chief Justice Saunders, famous for his reports, was actually a beggar boy, and was taken from charity into an attorney's office. Lord Clifford was the son of a grocer at Bristol, and owed his rise entirely to having attracted the attention of Sir Vicary Gibbs, who used to lodge at his father's house. Lord Erskine was a half-pay officer, without a shilling of property when he came to the bar; and

Curran owned truly, at the Prince of Wales' table, that he had been raised from the condition of a peasant only by the bar. All these great men must have been excluded by the regulations now about to be imposed, and doomed to inferior stations in life, where their talents would have been useless. Two other striking instances of the injustice of these restrictions might be afforded in the cases of Sir James Mackintosh and Sir Samuel Romily, both of whom it is known commenced their professional career with no fortune of four hundred pounds a year. The Benchers legislate in their secret chamber, over their wine, and give no reason for what they enact; but they may perhaps be taught the impolicy of agitating a question, which, being brought before Parliament, may lead to a further inquiry into the fitness of leaving such powers in their hands as they now even possess, and as they have acquired—nobody knows how.

Law-Suit about a Surname.

[This is translated from the French. It first appeared in the Paris Constitutionel. The translation was made for the Boston Daily Advertiser.]

A law-suit about a sur-name! Ridiculous enough, and yet not the less true, that the Royal Court of Nismes was so occupied through four solemn sittings, which were attended by a numerous and respectable auditory. The parties concerned were of the highest rank of society. There we saw a Prince of the Church, the Cardinal de la Fare, with the two Marquises, his brothers, who had cited before the court the two Marquises, Cabot de la Fare, one a knight of St. Louis, and formerly Chef d'Escadron, in the Light Cavalry; the other decorated with honors at Wagram and Dresden, and having also gained the rank of Chef 'dEscadron at the point of the sword. Of what, then did the Archbishop of Sens, and Auxerr complain? What did this Prelate require? He charged them with having usurped his name to make a surname for themselves. He charged them with having unduly taken the title of Marquis. He called on them to renounce both the title and the surname, and for the future to style themselves Cabot merely. What said the defendants? That they took the surname of de la Fare, in pursuance of an acquisition made in 1719 by their family, of an estate belonging to them, which descended with all its honorary and seignorial rights, that in so doing, they had followed an immemorial custom, that they had been Marquises quite as long as the Messieurs de la Fare; they had enjoyed both the title and the surname for a great number of years, without either being questioned; and that they had used them in a great number of public proceedings.

It was not one of the least remarkable features of this case, to hear the anti-feudal and even highly constitutional language used by the counsel for the Cardinal de la Fare; 'Our adversaries,'

said M. Bechard, 'pretend to hold the name of La Fare as a feudal surname! We leave them to defend property against usurpation, the law against abuse, constitutional principles against the decrepid pretensions of the old system. How many gentlemen peasants are there then whose nobility arises from the possession of a morsel of ground, or the remains of a ruined mansion. How many noble citizens are there whose titles were probably lost in the revolutionary disorders? Public irony does ample justice to their fallen vanity. Let us leave to the descendants of our ancient nobility, stripped as they have been of so many other benefits by our civil troubles, let us leave them that wreck of their last splendor, the lustre they owe to their name.'

This cause gave a fine opportunity, no doubt, for satirical eloquence; let us see whether Mr. Cremieux, who was counsel for the defendants, turned it to their advantage. His biting sarcasms more than once excited the laughter of the auditory. 'A Prince of the Church,' exclaimed the orator, 'a Grandee of the State, the Cardinal de la Fare, the Archbishop of Sens and Auxerre, Primate of the Gauls and of Germany, Duke and Peer of France, awakes all at once from a long slumber; he directs his noble looks to the extremities of his kingdom; from the interior of a palace of our kings, where he dwells, he perceives at the bottom of the province a peaceful family, whose audacity has led them to assume the surname of La Fare! In the circle of the immense horizon, he sees a speck which annoys him: it is the maker's cottage which offends the proud vanity of the Prince; it must fall. Yes, the same hand which at the conclave puts into the sacred urn the inspired suffrage which gives a Pope *urbi et orbi* (to the city and to the world), this hand writes and signs a declaration, that the Cardinal is our chief, and also our adversary. At the sight of such a plaintiff in such a cause, have I not the right to exclaim, *Vanitas vanitatum, et omnia vanitas!*—(Vanity of vanities, all is vanity.) We have smiled,' continued the counsel, 'in thinking that the Primate of the Gauls and of Germany should be critical upon feudality: we were rejoiced to hear the Cardinal de la Fare render such brilliant homage to our constitutional charter. But why these complaints in favor of ancient families? Of what has the Prelate been despoiled in our troubles, who appears here to-day with so many titles, and whose splendor is supported by accumulated allowances from the state, which exceed 100,000 francs (£4000 sterling), when we ourselves receive a pension of 1200 francs (£48 sterling) for wounds which compelled us to leave the service of our country? Again, have not those that reproach us done the very same thing themselves? Look at our adversaries: they used to be La Fare Latour, and La Fare Tornal, they now are La Fare Allais, and La Fare Venejean. In earlier days your family had for its surname Bringuier;

at a later period you took the surname of La Fare, deriving it from an estate where your ancestors dwelt, if you be really descended from the ancient La Fares, which is very doubtful. On this estate was a castle, which was crowned by high towers, called *whares* or *fares*, because, each being surmounted by a light, they serve as guides to navigators; you have them in your arms, and your motto is, "*Lux nostris, hostibus ignis*," (light for our friends, fire for our enemies.) It was for this surname you gave up that of Bringuier.'

M. Injalric, the King's Advocate, who next addressed the court, shewed an equal degree of acuteness, in speaking of the mania of surnames and noble distinctions, and of talent, in discussing the considerations connected with this trial; as well as great independence in his conclusions. Though they were unfavorable to the Archbishop, we are sure his eminence could not hear the concluding words of the advocate without deep emotion:

'There is no law that compels us to judge this case; and there is, on the contrary, a custom of eight centuries in favor of the Messrs. Cabot. It is difficult to make one's way through the cases of those who have used, or abused, as it may be, the silence of the law; and in this doubtful state of things, I am called on to make a victim of a respectable and aged man, and on the brink of his tomb—to plunge a poinard in his breast; I am called on to take away from him a name he has borne with honor, under which he is known, he has served, and he has done the most important deeds of his long career. In so doing I shall, I may say, tear from his breast the cross of St. Louis, which in that name he received; I shall carry despair into a heart devoted to the august family of our king: I should tarnish and disgrace him and his. Neither the honorable wounds of his son, Camille, nor the cordon of officer of the Legion of Honor which decorates him, nothing shall prevent me; and his two brothers, one a Lieutenant Colonel of the Guard, and the other a Captain, I shall see forced perhaps to quit their corps, or prove by their sword that they are not unworthy of the name they bear. I shall even reach him who was the companion of his Majesty in exile (M. de Bruges.) I shall even reach that General, brave in every battle, wise in every counsel, and always forward to support in the tribune the unfortunate who called for his aid, (Gen. Brun de Villeret, who is married to a daughter of the Cabot family,) and I shall listen to no considerations in carrying into effect I know not what law which has never yet been executed, and which is not capable of application to any case. Ah, no! I shall not; for the Messieurs de la Fare will not have it done themselves. Their noble heart denies what their mouth demands.'

The Court, in agreement with the King's Advocate, confirmed the judgment of the Great Tribunal, and decided that the Mes-

sieurs Cabot had the right to call themselves Marquises of Cabot de la Fare, without, however, having the power to sign or call themselves by the surname of La Fare, whether alone or preceded by the title of Marquis, unless the name of Cabot was used before it.

Ought we to be sorry that the Messieurs de la Fare have lost their cause? Ought we to congratulate the Messieurs Cabot for having gained it? Neither one nor the other, we must laugh heartily; that is all.

Legislative Decrees of Divorce.

The subject of divorce is, in some states, under the jurisdiction of the legislature, in others within that of the judicial tribunals. An application for divorce necessarily involves one of two questions; first, whether the marriage was void *ab initio*, or, second, whether one of the parties has by violating the contract forfeited all benefit under it. Both of these questions are strictly of judicial jurisdiction. When, therefore, a legislative body undertakes to decree a divorce, it acts in the capacity of a judicial court, for otherwise there would be two objections to any such proceeding by such body in the United States, the first being general, and of force in all countries, the second arising on the constitution of the United States; for it is contrary to the first principles of legislation, to *legislate* on private controversies in individual cases, for the will of the supreme power being previously declared, is a rule of conduct; but to determine the penalty of an act after it has been done, or to legislate in respect to past facts is a characteristic of an arbitrary government; and the constitution of the United States accordingly prohibits any law of a state in violation of contracts, or any *ex post facto* law, and if we consider a legislature, therefore, as *enacting* and not *adjudicating* in cases of divorce, this provision of the constitution is violated. The legislatures must therefore be considered rather as judicial tribunals in the exercise of this branch of their jurisdiction. And the question very naturally arises whether they are the best organized *courts* for the discussion and decision of questions arising on this particular species of contract. In our abstract of the legislation of North Carolina, in the Jurist for October last, our readers will recollect a long list of decrees of divorce. The same subject makes a conspicuous figure in some other of the States. Governor Shultze, of Pennsylvania, presses this subject upon the consideration of the legislature of that state, in his message of November last, in the following terms:

'Application for divorces to the legislature become every year more numerous, and of necessity consume, in the investigation of the concerns of individuals, a large portion of that time which

might profitably be bestowed on the business of the public. In some cases it is feared that application is made to the legislature and acted upon without sufficient evidence that the party complained against has been duly notified of the application intended. Could not all the ends of justice likely to be attained by the granting of divorces, be more certainly attained if the jurisdiction of our courts were more extended over them, and the causes of divorce more fully defined than at present?'

Summary process against tenants to compel a surrender of the demised premises at the expiration of the term.—In the same message of Governor Shultze, to which we have already referred, he recommends a provision in relation to landlord and tenant, as follows:

'If I am not much misinformed as to the operation of the laws which now regulate the relations between landlords and tenants, they loudly call for the benefits of revision and consolidation. This is more especially the case in our cities and large towns, where a large proportion of the houses are rented. I recommend in an especial manner, that a prompt and cheap remedy be devised by which tenants shall be compelled to surrender up possession, when required so to do, at the end of the period for which the premises shall have been demised. The act of the 25th of March, 1825, which was intended to remedy this evil in the city and county of Philadelphia, is complained of as almost wholly inoperative, as the tenant must voluntarily have removed from the premises before the landlord can have a writ of possession issued. How far the peculiar powers vested in landlords for the securing of their rent is founded in justice, or derived from the ancient laws of England, and adopted without sufficient examination, is a matter not unworthy to occupy a portion of the time of the general assembly.'

Tax on Law Suits. We regret exceedingly to meet with the following passage in the same message of Governor Shultze, to which we have alluded above.

'The importance of giving publicity with as little delay as possible to the decisions of the supreme court, is sufficiently obvious. It seems to be considered that the profits to be derived from the publication of reports of decisions, will hardly compensate for the labor and expense to be incurred in preparing and publishing them. I would therefore recommend that provisions be made by law for the employment of a reporter. By a small tax on writs of error, which could not operate oppressively on any one, a fund might be provided for the payment of the reporter.'

It seems to be enough to subject the parties to the costs of their

suits, without taxing them besides with the expense of publishing reports of the cases for the benefit of the public. The only apology for any such tax would be, that the public is at the expense of maintaining court houses, paying the salaries of judges, &c.; and the tax may be considered only as a reasonable compensation for those facilities afforded at the public expense towards the settling of private controversies. But this would not be a very liberal footing on which to put the question, and will not probably be considered a good reason for levying this very objectionable species of tax. Reports of decisions ought to be published, in some degree at least, at the public expense, and under public authority, for the reason that they are practically a part of the laws by which the conduct of people is to be regulated and their rights, obligations and duties determined; since the construction given to the laws by the courts, do in fact, to all practical purposes, constitute a part of those laws.

Law Drafting. We have occasionally remarked upon the unskilfulness of the drafts of some of the statutes which it has been our duty, in the course of our publication, to examine. It is indeed a little singular, that, in the practical course of our legislation, especially in the states, so many persons should be ready and think themselves quite competent to draft a law. We observe a law in the statute book of Massachusetts, the object of which was, probably, to substitute imprisonment for whipping, in all cases in which the substitution had not already been made by previous acts, but the act appears to abolish every species of punishment for all kinds of crimes, except a fine not over $ 200 and imprisonment not exceeding six months. The act runs thus:

An Act for abolishing the punishment of Whipping within this Commonwealth.

Be it enacted by the Senate and House of Representatives, in General Court assembled, and by the authority of the same, That no person, convicted of any offence, before any court of this Commonwealth, shall ever be punished by whipping; but the court, having jurisdiction of the case, may, and shall, sentence such convict to a fine, to the use of the Commonwealth, not exceeding two hundred dollars, or to imprisonment for a term not exceeding six months, according to the aggravation of said offence. [*Feb.* 28, 1826.]

QUARTERLY LIST OF LAW PUBLICATIONS.

Reports of Cases argued and determined in the Supreme Court of Massachusetts. By Octavius Pickering. Vol. VI. Boston. Hilliard, Gray, & Co. 8vo.

Reports of Cases argued and determined in the Court of Appeals of Maryland, in 1827, 1828, and 1829. By Thomas Harris and Richard W. Gill. Vol. 2. Annapolis. Jonas Green. 8vo.

The Law of Executors and Administrators. By Sir Samuel Toller, Knight; with considerable Additions by Francis Whitmarsh, Esq., with references to the Statutes of Pennsylvania, and the Principal American Decisions. By Edward D. Ingraham. Philadelphia. John Grigg. 8vo. pp. 623.

The New Hampshire Town Officer. By William M. Richardson. Concord. J. B. Moore. 12mo. pp. 299.

The Law of Pleading and Evidence in Civil Actions, arranged alphabetically, with Practical Forms and the Pleadings in Evidence to support them. By John Simcoe Saunders, Esq. 2 vols. Philadelphia. R. H. Small. 8vo.

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The Form Book; containing nearly three hundred of the most approved Precedents. By a Member of the Philadelphia Bar. Philadelphia. Tower & Hogan.

Condensed Reports of Cases in the Supreme Court of the U. States, containing the whole series of the decisions of the Court from its organization to the commencement of Peters's Reports at January Term, 1827, with copious notes of parallel cases in the Supreme and Circuit Courts of the United States. Edited by Richard Peters, Esq. Vol. I. Philadelphia. John Grigg. 1830. 8vo. pp. 655.

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vols. before published. Boston. Hilliard, Gray, & Co. Royal 8vo.

Reports of Cases Adjudged in the Supreme Court of Pennsylvania. By Thomas Sergeant and William Rawle, jr. Vol. XVI. Philadelphia. M'Carty & Davis. 8vo.

An Essay on Uses and Trusts, and on the nature and operation of conveyances at Common Law, and of those which derive their effect from the Statute of Uses. By Francis Williams Saunders, Esq. of Lincoln's Inn, Barrister. First American, from the fourth London edition. Revised, corrected, and considerably enlarged. Philadelphia. R. H. Small. 8vo.

A Practical and Elementary Abridgment of the Cases Argued and Determined in the Courts of King's Bench, Common Pleas, Exchequer, and at Nisi Prius; and of the Rules of Court. By Charles Petersdorff, Esq. Vol. II. New York. Gould & Banks. 8vo.

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The Chancery Practice of the State of New York. By Joseph Noulton, Solicitor and Counsellor. Vol. I. New York 8vo.

Hilliard, Gray, & Co. have in press, No. 1, Vol. 7, Pickering's Reports.

AMERICAN JURIST.

No. VI.

APRIL, 1830.

ART. I.—OBSTRUCTION OF A NAVIGABLE CHANNEL.

[The following case having excited some public interest, and involving a question of general and practical importance in all parts of the country situated on the sea shore or navigable streams, we requested Judge THACHER, before whom it was tried, to furnish us with the notes of his charge to the jury. He has very obligingly complied with our request, and also given us the use of his minutes of the case of the Commonwealth *v.* May, tried in the Supreme Court of Massachusetts in 1803, involving a similar question, and which has been sometimes referred to, but no report of it has been before published.]

A wharf extending into the channel of a navigable river, though it may in some respects be a public convenience, yet if the effect, in the course of time, will be to injure the channel by straitening it, by lessening the depth of water, or by giving a new direction to the current, and such injurious effect exceeds the public benefit to the navigation, is a public nuisance.

COMMONWEALTH OF MASSACHUSETTS, *Municipal Court of Boston,* } December Term, A. D. 1829.

The Commonwealth v. *William Wright and Abraham A. Dame.*

THIS indictment was found by the grand jury, at the November term, A. D. 1828, and was continued by consent to this term. It was for a common nuisance, and contained two counts. The charge in the first was, that the defendants, 'on the 1st November, 1828, did unlawfully erect in the harbor of Boston, being a common and public highway, and in the channel part and common current of the navigable water of the said harbor, and beyond the line of low water mark, a certain

wharf of wooden piers, of the length of one hundred feet and of the breadth of twenty feet, being of such large dimensions, that the citizens of the Commonwealth cannot pass, and navigate with their vessels through the harbor, as they were before accustomed to do.'

In the second count, after setting forth that the harbor of Boston is an ancient and common public highway, for all the citizens to navigate with their vessels, &c. it charges, that the defendants, 'on 1st November, 1828, in and upon the bed and soil of the said harbor, where it is usually covered with water, and in the stream channel and navigable part of said harbor, near the southern extremity of the same, did unlawfully place twenty piers of timber in the manner of a wharf, by reason whereof the navigation of the said harbor is greatly obstructed and narrowed;' both counts concluding, to the common nuisance of all the good citizens of the Commonwealth, and against the peace, &c.

The defendants severally pleaded, that they were not guilty.

The case came on for trial on Wednesday, 23d December, 1829.

J. T. Austin and *Lemuel Shaw*, Esquires, appeared as counsel for the Commonwealth; and *S. D. Parker* and *Samuel Hubbard*, Esquires, for the defendants.

After a brief explanation of the case by Mr. Austin, he called Stephen P. Fuller, Esq. who testified to the correctness of the plan exhibited, which had been taken by him, under an order of this court, of the part of the harbor and channel, where this wharf is situated, shewing the position of the wharf, the depth of the water, the free bridge, and other local objects in the vicinity. He also testified, that the wharf was built one hundred and forty-two feet into the channel, beyond the line of the low water mark, and that it was done by the defendants, and at their expense.

Mr. Austin then quoted the case of the Commonwealth *v.* the Inhabitants of Charlestown, 1 Pick. 180, and Rex *v.* Lord Grovesnor & al. 2 Stark. 510, and observed, that it having been proved that the defendants had narrowed the channel, it was therefore to be considered a nuisance, until the contrary should be shown, and that he should rest the cause there on the part of the Commonwealth.

The defendants were then called upon for their defence; and Mr. Parker, on their behalf, insisted, that the government

were bound to proceed further, and to prove that the wharf was a common nuisance, in support of which, he read various passages from the work of Mr. Angell on Tide Waters.

It was decided, however, by the judge, after some observations by the counsel for the Commonwealth, that the building of a wharf, or other structure, into the channel, which was a public highway, was to be considered *prima facie* as a nuisance, and that the burden was upon the defendants to shew that it was not so to be considered.

Upon the motion of the defendants' counsel, the case was adjourned to Thursday, the 24th.

The court opened on Thursday morning, at 9 o'clock, and were engaged to a late hour in the afternoon, in the examination of witnesses, first, for the defendants, and then for the Commonwealth. The further hearing was then adjourned to Monday, December 28th. The jury were cautioned by the court not to form a final opinion on the case, nor to suffer any person to speak to them on the subject, and were permitted to separate.

The court was engaged during the whole of Monday, and until Tuesday at noon, in the further examination of witnesses, and then adjourned to 3 o'clock P. M.

P. M. It was then shown, on the part of the defendants, that they claimed to own, and were in possession of the flats and upland under a deed from Isaac P. Davis to William Wright, who conveyed an undivided moiety to A. A. Dame, on 25th May, 1827. Davis derived his title under sundry mesne conveyances from Jabez Hatch, whose deed, which was dated in 1804, was called for by Mr. Shaw. But Mr. Hubbard denied, that it was incumbent on the defendants to produce it, as it was not in their possession, and insisted, that it was competent for the government to shew a copy from the records, if they chose so to do.

The case was then argued with equal learning and ability, and at great length, for the defendants, by Mr. Hubbard, and for the Commonwealth by Mr. Shaw. The points for which they respectively contended are noticed in the opinion of the judge; but it is not possible to do justice to their various comments on the law and the fact. The arguments were concluded at 12 o'clock on Wednesday, the 30th; and the following is a sketch of the observations of the judge to the jury in committing the case to their final decision.

Gentlemen: In committing this cause to you, I shall endeavor to condense my observations as much as I can consistently with my duty, so that your good patience, which has already been well tried, may not be exhausted.

But it is apparent, that it is a case of difficulty and importance, and I am very sure, from the interest which you have taken in it, that nothing would give you greater satisfaction, than to come finally to a result, which will reflect credit on the public justice.

It is a charge against the defendants for a common nuisance in building a wharf, of one hundred feet in length and twenty feet in breadth into the channel of the south harbor of the port of Boston. And it will be convenient for me to state to you, in the first place, the general principles of law, which apply to the case.

Our ancestors brought to this country the common law of England, which they claimed as their right and inheritance, and it has continued to be a part of our law to the present time, so far as it was applicable to our situation, and where it has not been altered or repealed by the constitution of the Commonwealth, or by acts of the legislature.

By that law, the sovereign is the owner of the shore, as it is called, which is the 'ground that is between the ordinary high water mark and low water mark,' as well in 'the shore of the sea as in the shore of the arms of the sea, where the sea flows and reflows, and so far only as the sea flows and reflows.' [Hale's Treatise De Jure Maris, c. 2, p. 12, in Hargrave's Tracts.](a)

When it is said, that the sovereign is the owner of the sea shore, it is meant, that the legal title is in him, not for his exclusive use and profit, but in trust for the common benefit of all his subjects. It is therefore his duty, as well as his right, to keep the sea shore free from encroachment, and not to suffer any individual, on his mere authority, to intrude on it.

But sometimes the common good of all the subjects requires that bridges should be erected across the channel of a sea or river, and that wharves and other commercial accommodations should be projected beyond the line of high water mark, and

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(a) The shore is that ground that is between the ordinary high water and low water mark. This doth *prima facie* and of common right belong to the king, both in the shore of the sea and the shore of the arms of the sea. *Hale's Treatise*, 12.

even into the channel; and therefore the law leaves it to the wisdom of the sovereign, and makes it his right and duty to have these constructed.

What in England belongs to the king, in our more free and equal system belongs to the people, whose will is expressed, and whose rights are represented by the legislature.

One of the earliest acts of the colonial government was to grant to the proprietors of the soil 'adjoining to creeks, coves, and other places about and upon salt water, where the sea ebbs and flows, the right of propriety to the low water mark, where the sea doth not ebb above a hundred rods, and not more wheresoever it ebbs further.' This was about the year 1641.

If a citizen, of his own authority, and without the consent of the legislature, and after so liberal a grant, shall infringe upon the right of all the other citizens, by extending his wharf beyond the line of low water, and into the channel, to the common detriment, it is his own presumption; and if the Commonwealth, in the exercise of its trust, shall eject the intruder, and cause the nuisance to be abated; he must recollect that he has offended against a principle of law, which is as ancient as it is reasonable, and as well known as any other principle in our code.

But it does not necessarily follow, because the defendants have extended their wharf beyond the line of low water and into the channel, that it is a common nuisance, and that it must be abated. Where it is shown that a person has intruded upon a highway which is common to all the citizens, and has appropriated it to himself exclusively, the *presumption is*, that it is a detriment to the public; because it is a diminution of their privilege in the enjoyment of a common right.(*a*)

(*a*) Among common nuisances to a port, Lord Hale mentions 'the straitening of the port, by building too far into the water, where ships or vessels might have formerly ridden; for it is to be observed, that nuisance or not nuisance in such case is a question of fact. It is not, therefore, every building below the high water mark, nor every building below the low water mark, is *ipso facto* in law a nuisance. It would be impossible for the king to license the building of a new wharf, or key, whereof there are a thousand instances, if *ipso facto* it were a common nuisance, because it straitens the port, for the king cannot license a common nuisance. Nay, in many cases, it is an advantage to a port to keep in the sea water from diffusing at large; and the water may flow in shallows, where it is impossible for vessels to ride. Indeed, where the soil is the king's the building below the high water mark is a *purpresture*, an encroachment and intrusion upon the king's soil, which he may either demolish, or seize, or arrest at his pleasure; but it is not *ipso facto* a

But the presumption in such case may be repelled, on the part of the citizen, by shewing, that so far from having created a detriment to the public, by extending his wharf into the channel, or by the structure which he has placed on the highway, he has thereby in truth increased their accommodation, and not diminished it; and therefore that he is not liable to be convicted of a nuisance, nor ought the wharf or other structure to be removed.

It is true, he may say, that this has been placed on the highway, and I know, that any citizen may use it. I can neither prevent him from the use, nor compel him to pay me for the enjoyment. The government may also, by its officer, enter upon it, and eject me from the possession. But what I have done is not a public evil but a public good.

The law is so; but then, as it is most reasonable, so I conceive it to be incumbent upon *him* to shew this fact in his defence. And I know that this was the course pursued in the trial of the case of the indictment against *John May*, in the Supreme Judicial Court, Suffolk, March, 1803, for a nuisance in extending Union wharf, at the north part of this city, into the channel. It was a case of great interest, and the trial occupied several days. The most eminent counsel were engaged on both sides, and the trial was before five of the seven judges, who at that time composed the court.(a)

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common nuisance, unless indeed it be a damage to the port and navigation. In the case therefore of building within the extent of a port in or near the water, whether it be a nuisance or not is *quæstio facti*, and to be determined by a jury upon evidence, and not *quæstio juris*.' *Treatise De Jure Maris*, c. 2. p. 12.

'Purpresture, in legal understanding, signifieth an encroachment upon the king, either upon part of the king's demesne lands of his crown, which are accounted in law as *res publicæ*; or in the highways, or in common rivers, or in the common streets of a city, or generally when any common nuisance is done to the king and his people, endeavoring to make that private which ought to be public.' 2 *Co. Inst.* 272.

(a) Paine, Strong, Sedgwick, Sewall, and Thatcher, Judges.

Davis, Solicitor-General, and Theophilus Parsons, for the Commonwealth.

H. G. Otis, R. G. Amory, and John Lowell, Jr., for the defendant. Sullivan, the Attorney-General, was sick.

Dana, Chief Justice, and Bradbury, J. were absent.

[The following report of this case is taken from the minutes of Judge Thacher, the present Judge of the Municipal Court of Boston, not the judge of the same name, who was one of the Supreme Court in 1803.]

Commonwealth v. *John May*.

Indictment for nuisance for erecting a wharf in the highway of the harbor of Boston. The subject of complaint was the erecting an addition to Union

In the trial of that case, in which there was a full discussion of the law, the great question was, whether it was compe-

wharf, at the north end of the town. On motion of Mr. Otis the jury went to the spot to view the wharf.

The solicitor-general stated the general doctrine of nuisances, and quoted the law of the Old Colony of Massachusetts, passed in 1641, which provides, 'that in all creeks, coves, and other places about and upon salt water, where the sea ebbs and flows, the proprietor of the land adjoining shall have propriety to the low water mark, where the sea doth not ebb above a hundred rods, and not more wheresoever it ebbs further.' The erection complained of in the indictment, was shown to be beyond low water mark, and the fact of erecting was admitted by the defendant.

The solicitor-general said that he conceived he had then done all that was necessary to support the charge.

Mr. *Amory*, in defence. To support the charge, the government ought to shew something more, than that the wharf was erected on a spot belonging to the public. It ought further to appear, that it is a detriment to the public. He then offered to shew by evidence that the wharf was a public benefit.

Parsons objected to such evidence. The defendant having admitted, that the wharf is on the highway, it cannot be a question of fact, whether it is a nuisance. A tavern might be placed on the highway. It might be a convenience to travellers, but the court would not go into such evidence.

Otis. If that doctrine is true, then almost every wharf in Boston harbor is a nuisance, and must be demolished. No prescription can be pleaded in favor of a nuisance, for the government cannot authorize one.

A harbor supposes something natural and something artificial. Vessels have access to it from the sea, they may enter, tarry, and depart. They may likewise load and unload their cargoes, to do which there must be wharves, extending into water of depth sufficient to accommodate vessels of heavy burthen. A highway in a harbor is something different from one on land. If trees are planted, or a horse-block placed on the latter, it would be for the jury to decide, whether such would be a nuisance, which is a common detriment. A ditch being dug in a highway, if it could be shewn to be an amelioration of the road, would be considered as part of the highway, and not a nuisance. Nuisance or not is always a question for the jury.

Parsons. If one man may extend his wharf beyond low water mark, he may carry it to the channel, and thus materially lessen the value of other wharves. If each is restrained within such limits as the law prescribes, the principle of equality is preserved. No inconvenience will follow. Should any arise, the legislature have power to provide a remedy. The legislature cannot, it is true, authorize a nuisance, but when a wharf is extended, by leave of the government, beyond low water mark, that could not be a nuisance. The continuance of a nuisance for sixty years would in such case be a good plea against government, and for forty years against an individual.

Mr. *Parsons* mentioned a case decided lately at Salem. Capt. Crowninshield was indicted for a nuisance in erecting a certain wharf in that place. The building was *on his own land* and *within* low water mark. But it was shewn at the trial, that it annoyed a Mr. Ward in the use of his wharf, so that vessels could not approach it. It was declared to be a nuisance on the principle, that a man shall use his own so as not to injure another. The jury found him guilty, and that the nuisance consisted of a certain number of feet, which were accordingly demolished.

Strong, Sedgwick, and Thatcher, were for the admission of the evidence. But Paine and Sewall not.

Sewall. The defendant is charged with having done something *in evil example to others*. This wharf is confessed to be on the highway. If others should do likewise, it would be a common detriment.

tent for the defendant to shew, in his defence, that the extension complained of was a public benefit. It was not intimated that the government was bound to go farther, in the first instance, than to prove, that the wharf was built below the line of low water mark, and that it extended into the channel.

'If any one,' says Chief Justice Abbot, in the trial of the case of the King *v.* Lord Grovesnor and others, indicted for a nuisance, in erecting a wharf on the river Thames to the injury of the navigation of that river, 'undertakes to make a change in a public highway, without resorting, in the first instance, to the proper tribunal, which has the power to decide, whether the change will operate to the prejudice of the public, he incurs the burden of proving, that what he does is not a nuisance to the public.' 'Much evidence has been adduced on the part of the defendants, for the purpose of shewing that the alteration affords greater facility and convenience for loading and unloading; but the question is, not whether any *private*

Several witnesses then testified, that they considered the wharf as a public benefit, in that it accommodated vessels of heavier burthen than could lay at any other wharf in the harbor.

After argument, the Court permitted the question, whether the wharf was not an impediment and injury to the wharf of Ebenezer Parsons, the prosecutor.

The witnesses said, that it was a detriment, but it did not essentially lessen the value of that property.

The case was argued at great length by Otis and Parsons.

The defendant admitted that the wharf was a *purpresture*, or an encroachment on public property, for which an information might be brought, or a writ of intrusion. But admitting it to be an injury to Parsons's wharf, he would have his remedy in a civil action. The great question on which the opinion of the Court was divided, was, whether since the soil was admitted to be in the public, the wharf was not of course a nuisance.

Before the wharf was erected, every citizen coming to the port, had a right to cross and recross this spot, and to moor his vessel there. This right belonged to the public, and no individual had authority to interrupt the public in the enjoyment of this right, much more to monopolize it. The public are the judge of their own advantages. Had Colonel May erected the wharf and given it to the public without claiming wharfage or dockage, it might have been a question, whether it was a nuisance. 2 Coke. Inst. 272. One man may not appropriate a public benefit to his sole and exclusive use. On pretence that a highway is crooked, he may not enclose part, and, upon opening into it part of his own field, exact a toll of travellers, on pretence that he had rendered the highway better.

Judges Strong, Sedgwick, and Thatcher, thought that it was competent for the jury to inquire, whether the erection, stated in the indictment, was a public benefit. If they should be of that opinion, they could not find the defendant guilty.

Judges Paine and Sewall said, that it was sufficient in their opinion, to authorize the jury to find the defendant guilty, that the wharf was erected on the public soil.

The jury found the defendant *not* guilty.

The trial occupied three days, and excited much interest.

advantage has resulted from the alteration to any particular individuals, but whether the convenience of the public at large, or of that portion of it which is interested in the navigation of the river Thames, has been affected or diminished by this alteration.' 'The public have a right to all the convenience which the former state of the river afforded, unless by the change some greater degree of convenience is rendered.' 2 Starkie's Reports, 510.(*a*)

It is the right and duty of the government, to preserve the highways from obstruction both by land and water; since both are of the highest moment, the one for the navigation of boats and vessels, the other for land carriage.

The port or harbor is free for all, whether citizens or strangers, to navigate, and ought to be preserved from impediments and nuisances, which would hinder and annoy the access, stay, or departure of vessels.

It is not necessary to dilate on the importance of a harbor to a place, whose inhabitants are dependent on commerce for their subsistence. Destroy the harbor, and you will soon make the city desolate. Indeed, so careful is the law of the freedom and security of the highway, both on land and water, that any person may, upon his own authority, lawfully remove by force a common nuisance. 'Any man,' says Lord Hale, 'may justify the removal of a common nuisance, either on land or water, because every man is concerned in it.'(*b*) The public may not be subjected to the inconvenience and delay of a long litigation; for the law in this matter departs from its usual severity, which forbids resorting to violence in most cases of civil wrong. For suppose a man should place his cart in the middle of State street; or should, upon his own claim of right, throw a bridge across the channel from the Union wharf to Chelsea, and so destroy the highway for the purpose of the passage of vessels to Charlestown, and to the western and northern parts of this city; it would not, I think, be tolerated for a day. But those, who by force remove a nuisance, act upon their own responsibility; and no one should resort to this forcible mode of redressing a nuisance, but where the right is

(*a*) 'But every individual who projects a wharf or other embankment in front of his land, in and upon the tide waters, does it at his own risk, and must take care that it shall not be prejudicial to the public.' 2. *Co. Ins.* 272.

(*b*) Hale's Treatise De J. M. 87.

clear and the necessity is urgent. 'Because,' says Lord Hale, 'this many times occasions tumults and disorders; the best way to reform public nuisances is by the ordinary courts of justice.' Hale's Treatise De Jure Maris, p. 87.

The object of the present indictment is to preserve the safety of the harbor of Boston, and to protect the public in the full enjoyment of what they are by law and of common right entitled to, *a free and unobstructed navigation;* and if you should finally decide, that the defendants are guilty, you must further say, what part of the wharf is to be considered as a nuisance, that the court may know what judgment to render on the verdict.

1. It seems not to have been contested by the learned counsel for the defendants, that the wharf is erected on the channel of the harbor;(*a*) which is, and ever has been, from the settlement of the country, common to ships, vessels, and boats of all sizes, to enter, remain, and leave at pleasure, whether belonging to citizens or strangers.

It is this right of common use which constitutes it a highway. 'As the common highways on the land are for the common land passage, so rivers, whether fresh or salt, that are for common passage, and ports and harbors, are highways by water.'(*b*)

2. The defendants have not denied, by their counsel, that they caused this wharf to be erected; not under the authority of an act of the legislature, nor even with the consent and approbation of the city, but on their own claim of right.

(*a*) Mr. Hubbard insisted, that not only was every wharf, at which a vessel might lie, a public benefit; but that a wharf which did not extend into the channel, must be, comparatively, of little value.

(*b*) If a person intrudes on the property of the public, it is a *purpresture*, and the people may enter upon the same by the proper officer of the government, and repossess themselves of it. This is in nature of a civil remedy. But an intrusion into or an occupying of the public highway, which straitens or incommodes the public in the enjoyment of a common right, as that of passing, is a common nuisance.

It may sometimes be very convenient, that a tent should be placed in the street, for passengers to rest in, or to refresh themselves; but it is a nuisance; for if every one should pitch a tent there likewise, it would destroy the street.

So if every citizen should build into the channel, it would destroy the channel. And, therefore, although one wharf extended into the channel might be a convenience, yet if every citizen should extend his wharf into the channel, it would destroy it, and therefore it would be a common nuisance. The legislature cannot authorize a common nuisance. But as it is for the good of the public, that the bay should be furnished with convenient wharves, running into the channel, for the accommodation of large vessels, of the convenience and necessity of which the legislature must judge; so it belongs to them to supply this necessity or convenience, or to authorize individuals to do it at their own charge, and to remunerate themselves by a charge for wharfage, dockage, &c.

They are in possession of the upland under a claim of 'propriety.' Whether their title to these flats is absolute and under a legal title, need not give to you any trouble to settle. The title is not in issue. No one claims it against them; no better title is shown; and they are, at any rate, answerable for the nuisance, if you shall find it to be one. I have not been able to see, that the goodness of their title to the flats and upland, is a material point to be settled in this cause.

3. On the part of the Commonwealth, it was first proved by the testimony of S. P. Fuller, the surveyor, that the defendants have extended this wharf to the distance of one hundred and forty-two feet below the line of low water into the channel, which is, at this place, three hundred and fifty feet wide. Here the counsel for the government rested their case in the first instance. If nothing more had been shown on either side, it would have been for you to say, whether such an encroachment on the public highway without necessity, or justification, or proof of benefit to the public, was not a common nuisance. I should have felt bound to instruct you, that it was an encroachment on the public convenience, and that in the absence of all proof, on the part of the defendants, tending to shew, that the wharf was a benefit to the channel, you would be bound to find them guilty.

The case would have been different, if the Commonwealth had complained of a wharf, erected within or above the line of low water. This would have been within the legal right of the defendants; and the presumption would therefore have been, that it was no more than they might lawfully do; and until it had been shown by evidence, that it was, in fact, a nuisance, the defendants could not have been required to justify or excuse the act.

The defendants have gone into the examination of many witnesses, and from the testimony they argue, that this wharf is a common benefit to the citizens for various reasons, viz:

1. Because, they say, it furnishes a safe and efficient guide to those who navigate that channel, being built on a line with the current, and so facilitating the passing of vessels.

2. It furnishes a facility for those vessels which intend to pass through the draw of the free bridge; because by running a warp from the vessel to the wharf, it can get along with more safety and ease than in any other way.

3. It will save time, in moderate weather, to make vessels fast to this wharf, instead of dropping an anchor, which they would otherwise be obliged to do.

4. In returning through the draw from the more southerly wharves, vessels are furnished with a great convenience by running a line to this wharf, so as not to come to anchor, or stand in the way of other vessels following them through the draw.

5. It is a convenience for vessels to lie at this wharf waiting for a wind, rather than to attach themselves to the buoy, where they are apt to run foul of each other.

6. This wharf protects vessels lying at it in a north-east storm, and furnishes a necessary protection to the bridge.

The counsel for the defendants insisted, that the wharf did not narrow the channel so much as was pretended; or divert the channel into a new direction. And he ingeniously argued, that if the wharf was away, a succession of buoys would be required to direct the passing of vessels; and that the space was not wanted for vessels as the water was not of sufficient depth to permit them to pass over it, or to come to anchor.

But, on the other hand, Mr. Shaw, in his closing argument, for the prosecution, after displaying the importance of the harbor and navigation to the prosperity of the city, how much it depended on the coasting trade, and how necessary it was to keep this channel free for the passing of vessels to and from the wharves at the south of the city, insisted that this wharf is an encroachment on the public highway, and that, by law, the defendants were bound to shew that it did not injure any one, and that it was a decided benefit to the navigation.

It is undoubtedly true, as the learned counsel has urged, that to straiten a public highway is always an inconvenience, and that you are bound not to allow it on possible grounds of speculative advantage. It is for you, however, to determine, whether the whole space, which nature has assigned to the channel in this quarter, is not wanted for vessels to come to and lay at anchor.

It is contended by the counsel, that it has been made clear by the testimony of the witnesses, that the depth of water is lessening in our harbor, and that every new wharf has a tendency to increase that effect. And further, that the erecting of this wharf has caused a prejudice to the channel, by giving a new and more southern direction to the current.

He has argued, that although it may be convenient, in some cases, for vessels passing this wharf, to make use of it for towing and warping by it, so as to approach the draw of the bridge in that way; yet, that no such right as that of *towing* exists; and that the defendants may exclude individuals from making that use of it.

I am of the opinion, as to this point, that if an individual erects a wharf upon the highway, he cannot exclude any of the citizens from going upon it, and using it, as if it were in its natural state. The improvements made upon it by individuals, do not change it from public to private property. But I do not consider, that the citizens may freely, and without the consent of the proprietor, enter upon a wharf, which is erected within the line of low water, for the purpose of towing their vessels or for any other. In such case, the proprietor would have a right to insist on compensation for the use made of his estate; but one, who has intruded upon the public highway, may not only not claim any compensation for such use made of his improvement, but any citizen may rightfully abate the encroachment, and the officer of the government may enter upon it, and reinstate the public in its rights.(*a*)

That you may settle the facts in this case with intelligence, you must examine impartially the testimony of the witnesses on both sides. They are numerous, thirty-five having been examined for the defendants, and thirteen for the Commonwealth. It is your peculiar province to decide, whether they were honest, intelligent and independent witnesses; to compare the degree of knowledge which they severally possess; and to ascertain whether it was the fruit of experience and observation, or derived from the information of others.

The witnesses, on both sides, consist of masters of coast-

(*a*) It has been settled in England, 3 Durnford & East, 253, Ball *v.* Herbert, and after great consideration, that the public have not the right, at common law, to make use of the banks of navigable rivers, for the purpose of *towing* vessels.

But in that case, it was not denied, that the banks were the property of private persons, and that constitutes a plain distinction between that and the present case.

Here, private individuals have, recently, since the year 1828, and without right, intruded upon the *public highway*, by extending a wharf into the common channel. Such an act of usurpation, if acquiesced in by the public for forty years, would confer a right of property upon the usurpers. But I know of no principle or decision, which will authorize them to exclude the public from the wharf, thus standing on the highway, or to demand wharfage, dockage, or any other compensation for the use of that property.

ing vessels and lightermen, who have navigated this channel, and of experienced navigators and pilots, and of other citizens, who have done business in the vicinity of the wharf, or whose course of duty has called them frequently to that quarter. Most of them are acquainted with the harbor, and qualified to form a judicious opinion of the effect of this wharf upon the southern channel.

Here the judge, after referring to the length of time which the trial had occupied and to the several adjournments which had occurred, read the testimony of each of the witnesses from his minutes, the counsel on both sides comparing it with their own.

Now it may undoubtedly be true, that this wharf may occasionally have been useful to vessels passing through the channel in that quarter, and yet, if all the purposes for navigating vessels there, can be effected by a buoy, which is moveable, and causes no obstruction, then the necessity for this permanent wharf thrown into the channel is removed, and it will cease to be a benefit.

If the effect of building a wharf into the channel will be, in the course of time, to injure and destroy the channel here, by lessening the depth of the water, or by giving a new and injurious course to the current; and if such injurious effects will in your opinion exceed the benefit to navigation, you must, in that case, declare it to be a common nuisance.

If the defendants have left it doubtful in your minds, whether this structure is a decided benefit to the navigation, they have failed in their defence.

Finally, you are witnesses sworn to decide what you believe to be true from all the testimony; and you are to apply to the case a sound and impartial judgment, not failing to exercise that common sense, which is the effect of your own experience in such matters, and without which the deepest research into books will fail of the truth. But as it is not to be expected, that in a case of so much interest, and which has led into such a field both of fact and argument, difference of opinion may not exist; you will permit me to add, that as you have exercised so much patience towards the parties, it is most reasonable that you should, in your deliberations, exercise like patience towards each other; and so, I doubt not, you will come to a united and just result.

Verdict. The jury find the defendants guilty, and declare so much of said wharf a nuisance as is contained in a triangular piece marked upon the plan, beginning at the south-east angle, and running fifty feet westerly, and from thence to the north-east angle of said wharf; and not guilty as to the residue.

Municipal Court, February Term, 1830.

Wednesday, February 10th. The defendants appeared in court, on this day, by order, and expressed their readiness to submit to the sentence of the court, without appealing from the judgment to the Supreme Judicial Court, as by law they might. The judge informed them, that it must be part of the judgment, that the nuisance should be ordered to be abated at their expense.(*a*) They then stated, that it would be attended with

(*a*) In Rex & Regina *v.* Wilcox Hill, Salk. 458, the defendant was convicted of a nuisance for maintaining a glass house, for which he was fined, and the nuisance was ordered to be abated. And the court held, that by a general pardon, he was discharged from the fine, but not as to the abatement of the nuisance. For the abatement is not the punishment of the party, but the removal of that which is a grievance to other people.

In Baten's case, 9 Co. 55, Coke says, there are two ways to redress a nuisance, one by action, and in that he shall recover damages, and have judgment, that the nuisance shall be removed, cast down, or abated, as the case requires; or, the party grieved may enter and abate the nuisance himself, as appears by 17 E. 3. 44; 9 E. 4. 35, but then he shall not have an action, nor recover damages, &c.

Stra. 686. Dom. Rex *v.* Pappineau. The defendant was convicted of erecting a mole, and for dressing hides and sheep skins in the same, to the common nuisance. Judgment, that he be fined £100. On error brought, it was contended that the judgment was defective because it was not ordered, that the nuisance be abated. After argument by the counsel, the Court were divided in opinion. Raymond, C. J. Powys, and Reynolds, argued that the judgment was good; because the nuisance consisted in using the mole for an unlawful purpose, and not in constructing it. And therefore, it was sufficient to order the defendant to pay a fine, which would probably effectually stop the nuisance in future.

But Fortescue, J. considered that the mole and the use to which it was applied, constituted the nuisance, and that the judgment was erroneous and defective for not ordering it to be abated.

However, after considerable delay, the judgment was affirmed.

In Dom. Rex *v.* Rosewell, H. 10. W. 3. Salk. 459, a small fine only was set upon the defendant, who was convicted of a riot in entering upon the soil of another person and pulling down part of a house which was a nuisance to the defendant's house by stopping his lights, air, &c.

Brookes' Abr. Nuisance, 39. In an assize of nuisance for digging a ditch, and on inquiring as to its extent, the court ordered, that so much of the ditch as caused the nuisance should be abated, and that the rest should remain.

In 1 Hawk. P. C. 365, c. 75, s. 14, it is said, that one convicted of a nuisance, done to the king's highway, may be commanded by the judgment, to remove the nuisance at his own costs; and it seemeth to be reasonable, that those who are convicted of any other common nuisance should also have the like judgment.

of both, by some laws, over those by simple contract, and making other distinctions among the various claimants, according to the dictates of humanity, or the prejudices of the community, and policy of the laws and institutions under which he lived. Whatever distinctions are made in these respects, are questions among the claimants themselves, the principle above laid down being acknowledged, that his property is not subject to his own disposition by will, but to distribution by law to those who claim by right and obligation of debt, and not as donees or inheritors. If the debtor acknowledges himself insolvent, the law ought, by parity of reason, to step in and order the distribution in precisely the same way, since it is as unjust to allow a debtor, who confesses himself insolvent, to determine the distribution of his effects, according to his own partialities and attachments, as to permit him, in case of his decease, to make a similar distribution by will. In either case it is to allow him arbitrarily and capriciously, according to his own fancy or partialities, to decree the division and disposition of the estate of other persons. And it is a singular anomaly in the laws of some three or four of the United States, that they have hitherto made no provision for cases of acknowledged insolvency, but have left the division of property, which belongs to creditors, to the caprice of the debtor. The permission of so gross and palpable an abuse, is a grave reproach to any code; since, to this point, the case is too plain to be mistaken, and the obligation to make provision by law, is too imperative to be neglected with any shadow of apology.

But after passing this point, the subject is not without its perplexities; for, though the sovereignty of every state ought to, and virtually does, promise, as King John did at Runnymede, *nullus liber homo capiatur vel imprisonetur, nec super eum ibimus, nec super eum mittemus, nisi per legem terræ;* yet the very important question still remains, When and under what circumstances a man shall, *per legem terræ*, be proceeded against. As long as a debtor does not declare his own insolvency, the law must require some conditions before entertaining the inquiry, and one of the great difficulties in legislating upon this subject, is to fix upon and regulate these conditions. The most obvious fact in proof of insolvency, and one which appears to be an indispensable condition, in order to proceed against a debtor as an insolvent, is, that he should be proved to have been delinquent in his payments, and have failed

to satisfy some debt, which is unquestionably due and demandable. Accordingly, if a final judgment recovered against him, remains unsatisfied, this appears to afford sufficient *prima facie* evidence of insolvency, for the debt can no longer be disputed. This is not, however, a conclusive proof of insolvency, since, as we well know, by frequent experience, that persons unquestionably solvent, do not always forthwith satisfy debts established by a judgment, and which cannot, therefore, be any longer the subjects of dispute. But such a delinquency is certainly a just ground of instituting a judicial investigation respecting the party's solvency. The only reason for a distinction between neglecting to satisfy a debt by judgment, and any others, is, that it is not a subject of any further dispute, whereas other debts may be claimed, which the alleged debtor may deny, or against which he may have some set-off. But there seems to be so much presumption of an unconditional and indisputable debt, in cases of bonds for the payment of money, or bills of exchange and promissory notes, that the neglecting to satisfy either, when due, appears to be a just *prima facie* evidence of insolvency, and may fairly be a ground of instituting judicial investigation of the fact. Other circumstances are generally enumerated as establishing insolvency, or a design to defraud creditors, as will appear more particularly in the sketch of the different systems of insolvent and bankrupt laws which we propose to give in this article, and the presenting of which is our principal object; for though, in a previous number,(*a*) we treated of the subject of a national bankrupt law pretty fully, and need not repeat the arguments we there used in favor of such a measure, there is still enough remaining to be said on the subject of the laws of debtor and creditor generally; and a condensed view of the provisions of various codes on this subject, will present to our readers some general principles of practical importance. We are moreover, not without hope, that this collation may clear away some of the difficulties in which the subject is involved.

The declaring any person insolvent, and thereupon divesting him of the title to his property, and proceeding to administer upon his estate while he is living, and this without his consent, is evidently going very deeply into his rights and interests; and whether we should consider insolvency a fault or mere misfor-

(*a*) No. I, Vol. 1. p. 35.

tune, and more especially, if the proceeding is founded on an alleged or supposed intention of defrauding creditors, the proceedings should be guarded by the surest provisions in favor of the rights of the debtor, and it is certainly a departure from the genius and principles of our institutions to proceed upon the fact of insolvency, until it is established by confession, or formal and solemn judicial investigation; and a question may fairly be made, whether this fact, so important to the debtor, should not, if disputed by him, be tried by a jury. Some of our codes provide for such trial. But according to most of our insolvent laws the declaration of insolvency comes from the insolvent himself, and there is accordingly no occasion for such a trial. Where an insolvent law, as that of New York, makes the debtor's concealing or absenting himself, with the design, as the law of course presumes, of defrauding or delaying creditors, an act of insolvency, it is a fact very proper for the determination of a jury. As far as lying in prison under an arrest on execution for debt is made a criterion of insolvency, as in the English insolvent law, it is a fact, concerning which there can be so little doubt that the trial of it by jury would be merely nominal, and of no practical importance.

Whether insolvency is confessed and declared by the debtor, or established by legal proceedings, questions in respect to his honesty or fraud may arise; and some of our systems of insolvent laws make a special provision for the trial of these questions by a jury. In others it is provided that all benefit from his discharge shall be forfeited by fraud; but the question whether fraud or not, is not directly determined in the course of the proceedings in the insolvency, being left to be tried incidentally on the debtor's being afterwards arrested for the remainder of the debt not satisfied, in case of the discharge purporting to be from future arrest only, or on a suit being brought for such remainder, where the certificate purports to be a discharge of the debt. It is, however, a defect in any laws on this subject, to enact that fraud shall defeat the discharge, (whether of the debt or from future arrest,) and not at the same time to provide for the decision of this question once for all; since if it be left to be tried incidentally, the decision may be sometimes one way and sometimes the other, as the question comes up necessarily before different juries in arrests or suits by different creditors. The only penalty provided by other laws, is that of perjury, the provisions of the law requiring

the schedule of property to be sworn to by the debtor; this is, however, a superfluous enactment, for the laws of every community provide for the punishment of perjury.

Another distinction in these laws appears in the different modes by which the transfer of the title to the debtor's property is effected, and also in designating the assignee. One mode of provision is, that the declaration of insolvency by the debtor, before the magistrate or tribunal appointed by law for the purpose, shall *ipso facto* transfer all his estate to the assignees named by the law or by the debtor. But according to all these laws, he makes a schedule and a specific or general conveyance in conformity to it; and here a distinction arises as to the extent of this conveyance, if specific, namely, whether it conveys the whole of his property or only that described in the schedule. This question has arisen under the insolvent laws of one of the states, we do not now recollect which. Every act of this sort necessarily requires a schedule to be furnished by the debtor, since he must know best what property he has, and where it is situated. If it was in all cases situated within the jurisdiction of the laws under which the assignment is made, it would not be material whether the transfer should be made by the operation of law on the confession or judicial establishment of the fact of insolvency, or by a conveyance by the debtor; in such case it might be preferable perhaps to leave the transfer to the operation of the law, since it would remove all technical difficulties and defeasances arising from defects in form, or doubts respecting the construction of the assignment. But it will often happen that a part of a debtor's property is situated out of the jurisdiction of the law under which the assignment is made. And this is a case which ought to be in the contemplation of every bankrupt and insolvent system, for, as far as the assignment is in question, there is no difference in these two systems. If a specific assignment is required, it of course meets the case, but if a short general assignment only is required, or it be left to the operation of law, a specific transfer of property under foreign jurisdiction ought to be a subject of provision. Under the English bankrupt law, the operation of the assignment on property in this country, has been defeated in some instances where there did not appear to be such a specific, voluntary transfer by the bankrupt himself. The question arose in the cases of Holmes *v.* Remsen, 20 Johns. R. 229, and Blake

v. Williams, 6 Pick. 286. In these cases, and most of those cited in them, it is held that the assignment by the commissioners under the English bankrupt law does not prevent an American creditor from arresting the property of the bankrupt in this country, in the hands of persons indebted or accountable to him. 'A prior assignment in bankruptcy under a foreign law,' says Chancellor Kent, 2 Com. 329, 'will not be permitted to prevail against a subsequent attachment by an American creditor of the bankrupt's effects found here.' He considers this doctrine to be established by the weight of the authorities, though in Holmes *v.* Remsen, 4 Johns. Chan. R. 460, it appears that the court considered the contrary doctrine would have been more consonant to the principles of national comity and the respect which is due, throughout the world, to the proceedings of a court or provisions of an act of a legislature in relation to subjects within the jurisdiction of either. But the application of this doctrine is only co-extensive with the jurisdiction, the limits of which will still be the subject of inquiry, though the doctrine of liberal comity is admitted, for no judicial comity can justly be construed to impart to foreign laws or decrees a borrowed and extraneous force. In respect to real estate held by a bankrupt or insolvent under a foreign jurisdiction, the objection in the way of the operation of a foreign statute or judgment upon the title, is much greater than in respect to personal estate so situated. The doctrine on this subject is stated very strongly, in Lord Kames's Principles of Equity, b. 4, c. 8, s. 16, where it is said, 'a law cannot force the will nor compel any one to make a conveyance. In place of a voluntary conveyance, when justice requires it to be granted, all that the legislature can do is to be themselves the disponers; and it is evident that their deed of conveyance cannot reach any subject, real or personal, but what is within their territory. This makes a solid difference between a *voluntary* and a *legal* conveyance. The former has no relation to place; the latter, on the contrary, has the strictest relation to place, and reaches not lands nor moveables *extra territorium*. We may then with certainty conclude, that the statutory transferance of property from the bankrupt to the commissioners, cannot carry any effects in Scotland; these are subjected to our laws, and our own judges, and cannot be conveyed from one person to another, by the authority of any foreign statute.'

The general doctrine of this passage is doubtless true, but it

is certainly pushed beyond its customary latitude, for the administration and distribution of the personal estates of deceased foreigners, after the payment of creditors in the country where the property is situated abroad, is always governed by the laws in force where the deceased was domiciled. This doctrine would, in Scotland, in the United States, and also in all those countries where the civil law is adopted, execute a foreign statutory transfer of the personal property of a deceased foreigner. So contracts made in relation to personal property abroad will be construed by the courts where the property is situated, according to the laws of the country in which the contracts are made. Whether the dissolution of the party be natural or merely commercial, the laws of his domicil are permitted to control his personal property abroad, at least after the claims of creditors residing where the property is situated, are satisfied. And the question seems, on the whole, to be, not precisely to what extent you will give force to the disposition of personal property, within your jurisdiction, in pursuance of foreign laws or adjudications, but rather in what degree you will modify and limit the operation of the foreign law in favor of your own citizens.

In the same case of Holmes *v.* Remsen, 20 Johns. R. 260, Mr. Justice Platt gives as a reason why the assignment abroad, under a foreign bankrupt law should not be held to transfer the property in this country, the 'principle universally acknowledged that a discharge of a bankrupt or insolvent debtor, affords no relief from his foreign debts; it has no effect beyond the jurisdiction where it is granted. 2 H. Bl. 553; 8 T. R. 609; 1 East, 6; 1 Mass. R. 198; 3 Caine's R. 154; and 2 Johns. R. 235. It seems, therefore, unequal and inconsistent, to give such effect to the bankrupt system of any country as to strip the bankrupt of all his personal property and choses in action in a foreign country, and yet leave him bound for all he owes abroad.'

In the same case, the subject of the validity of a specific assignment by the bankrupt *personally*, is considered. The question in the case, is, whether an American creditor of Mullett, an English bankrupt, or his assignees in England, were entitled to recover the amount of a debt due to Mullett in the United States. 'The next question,' says the same judge, 'is whether the assignment made personally, by Mullett, after the commission of bankruptcy, was effectual to transfer this chose

in action to the assignees? In the first place I doubt its validity, because it was merely collateral to the proceedings under the commission, and was in some degree compulsory. But there is a stronger ground of objection. I admit that as between the bankrupt and his assignees and English creditors, they are all bound by the law of their own country; and though I deny the statutory assignment to create a lien here, so as to deprive the American creditors of their remedy by attachment, under our laws, yet it seems to me that the bankrupt Mullett, by the law of his domicil, was incapacitated to make any assignment after the act of bankruptcy for which the commission issued; as to him, all his personal property and *choses in action* throughout the world, and his power over them, were taken away, and the assignees under the commission were substituted in his stead. It was in the nature of an administration granted on the estate of a man, who, in regard to his property, was civilly dead. I deny the lien or preference here, by virtue of that statutory assignment, but freely admit the right of those assignees to sue here, by virtue of the commission or authorization in England, (requiring them perhaps to use the bankrupt's name); and we would not allow the bankrupt to release the debt or to thwart or defeat the suit of the assignees. My opinion, however, is that the assignment made *personally*, by Mullett, after the commission of bankrupt, was a mere nullity. The law of his domicil has deprived him of all power and control over his property, and had appointed administrators in his stead. To test this position, suppose, instead of an assignment, made personally by him to the assignees, under the commission, as in this case, Mullett had made a similar assignment to any other person; I cannot entertain a doubt that in such case, we should respect and allow the statute-assignees, so far as to permit them to sue for and recover the *choses in action* here, in opposition to any other assignee whom the bankrupt might appoint. My opinion on this point, therefore, is, that the assignment personally made by Mullett, after the commission of bankruptcy, added nothing to the title of the assignees, because he was, by virtue of the bankrupt laws, rendered incapable of making any transfer of his property.'

This opinion we understand to be a correct statement of the more generally received law upon this subject; from which it appears that a specific assignment made personally and voluntarily by the bankrupt or insolvent himself, may have more force

abroad, than one resulting merely from the operation of law. And since the object of every bankrupt and insolvent law is the rateable distribution of the debtor's whole estate, wherever situated, among all his creditors wherever residing, no provision ought to be omitted which may promote this object, and the special assignment by the bankrupt himself of all property and demands subject to a foreign jurisdiction, with early notice by the assignees to the debtors of the bankrupt, and holders of his property, might be effectual to this end, where the transfer by the mere operation of the bankrupt or insolvent law would be defeated. Such a specific assignment and notice might be defeated, by a previous lien obtained by a foreign creditor in a foreign country, which, with proper vigilance on the part of the bankrupt, could generally be prevented, or by an act of the foreign government embargoing the debts and property of the bankrupt as a pledge to his creditors under the same jurisdiction, a measure to which the government is not likely to resort, provided those creditors have an opportunity to come in under the bankrupt's assignment, for their fair proportion of his property. It appears at least highly probable that such a doctrine might be adopted in relation to a bankrupt or insolvent, becoming such by his own petition.

The appointment of the assignees or trustees under these laws, is variously provided for. The sheriff of the county where the property is situated, being the trustee nominated by the insolvent laws of Virginia, Kentucky, and some other states, it being provided by the same codes that the sheriff of the county where the debtor is imprisoned, shall be the assignee of property situated out of the state; while, by the other codes, the trustees are appointed by some court. The bankrupt laws of both England and France, submit the appointment of the trustees in the first place to the courts, and eventually to the creditors; but under some restrictions; and there seems to be a very good reason for giving them a voice in this appointment, since they are the parties to whom the property in fact belongs. They may, however, be scattered and at a great distance from each other, and, though they should reside near to each other, as they are not likely to constitute a body that can very readily and advantageously act in concert, being brought together only by the accidental relation of creditors to the same debtor, a thing that may happen among persons, no two of whom have any other principle of association, it is by no means expedient

to leave any part of the actual administration of the estate absolutely dependent upon their movements or proceedings. To save obstructions from this cause, most of the bankrupt and insolvent laws provide for the administration and distribution of the estate, without much direct agency on the part of the creditors, leaving to them, however, the right of control in some material points, more particularly the appointment of the assignees, or *syndics* as they are called by the civilians. The English bankrupt law provides for their appointment by the concurrent voice of the creditors and commissioners, who may, for this purpose, be considered as the tribunal having cognizance. The creditors, at their second meeting, nominate assignees, who must be approved by the commissioners of bankruptcy, before they can act. The English insolvent law leaves this appointment wholly to the court. The French law refers the final appointment of the syndics to the creditors, after it is ascertained that no compromise will be made between them and the debtor, and that the administration of the estate will proceed under the law, and judicial cognizance. Both systems of bankruptcy are thus wisely so contrived, that the provisional executive steps, in the administration of the estate, shall not depend upon the movements of a body so heterogeneously constituted as that of the creditors is in most cases likely to be. And the requirement of the concurrence of the commissioners in the act of appointing assignees, and a similar requisition in some of our insolvent laws of the concurrence of the judge in the same appointment, is a judicious precaution against the combinations of a part of the creditors with the debtor for defrauding the others; for it is to be borne in mind that the doings of the meetings of the creditors, unless subjected to some supervision, may, by management and connivance on the part of a small number, be perverted to the purposes of a fraudulent and partial distribution, since many of the creditors, on account of their distance or their small expectations from the distribution, may not be able or not be induced to give a very vigilant attention to the administration. It is, therefore, due to them that the law should interpose in their behalf, and not exact of them that strenuous application to their interests of this description, which it is hardly possible for them, in all cases, to bestow; and which, were it possible, it would be unreasonable in the law to demand. Besides, judicial interference is requisite and justly demandable, in the appointment of the assignees, and the other proceedings, on

the ground that the interests of the creditors are not the only ones to be consulted; since all persons, whose property and rights are implicated with those of the insolvent, should be in some degree represented by the judicial tribunals. Suppose, for instance, that assignees should be appointed by the creditors originally, and be subject to their direction and control, though these assignees might by law be made answerable to the other parties whose affairs are confused with those of the debtor, yet it might happen that their responsibility might not be an adequate security to such as had consigned property to the debtor, which might specifically remain at the time of his insolvency or bankruptcy. So again, by the French law, the wife has a right to withdraw her separate property from the stock of her insolvent husband, and yet it is likely to be confounded with it, and under the control of the assignees, until the extent of her claims is settled by judicial proceedings. It is accordingly a just object of those laws to guard the interest of those persons whose claims are at variance with those of the creditors, and one of the most important acts in relation to their rights is the appointment of the persons who are to have charge of the effects until those rights should be adjusted and the claims arising upon them satisfied. For these reasons, if the question were, whether to leave the appointment of assignees entirely to the creditors, or the tribunal having jurisdiction, the preference should certainly be given to the latter, but the intermediate course taken by the English bankrupt law and some insolvent laws, of giving to the courts the original provisional appointment, and the subsequent supervision and control of the acts of the creditors in this respect, seems on the whole to be best adapted to the interests and relations of the respective parties. In regard to the appointment of the sheriff of the county in which the debtor resides, or in which a suit is brought, which gives occasion to the assignment, as in the states abovementioned, we have not been informed of the practical advantages and inconveniences resulting from it in experience, but we will venture the opinion, that, as a general provision, it is very imperfect. In commercial places, or in the inland towns where manufacturing or any other business is carried on upon a large scale, the assignment of the administration of the extensive and complicated concerns of all insolvents to this officer, would certainly aggravate the sacrifices which are sufficiently great in winding up the concerns of the bankrupt

or insolvent, under the best management. It must very often happen, also, that a great deal of the insolvent's property is out of the state, in which case the sheriff is evidently the most unfit assignee, since his duties, more perhaps than those of any other officer, confine him to his own county. Such a provision appears, on a general view, to be tolerable, only where business is done on a small scale, or the insolvent law is so framed that only very inconsiderable concerns of debtors are likely to be brought under administration in pursuance of it.

It may perhaps be said, in reply to these objections, that the law operates very well, and no inconvenience is experienced where it is in force; but to give this reply any weight, it must be made by one who is intimately acquainted with its operation, and who has compared the proceeds of an estate under this management, with what they probably would be under any other. It is an ordinary argument against the proposition of very many measures, that we are very well as things are; and yet the persons who use the argument do not probably know how well or ill things actually proceed. Thus, when a new power or process is proposed to be given to the courts, the reply against it is, that we see no reason for the innovation, the public does not call for it, &c. &c. whereas the defects to be remedied and the evils to be redressed, are of a silent, negative kind; they do not appear in what strikes the senses or gains notoriety, but secretly and imperceptibly reach individuals, now and then, who feel the effects without being able to refer them to their true cause, which may be remote and obscure, and thus the remedy needed is not definitely and specifically suggested to them. For example, where courts are not invested with the power of granting injunctions against nuisance, or against waste on an estate by tenants for life, or of decreeing the specific execution of contracts, though some one under the jurisdiction will feel the effects of this imperfection every month, or perhaps every day, yet a great part of the community would say that they were satisfied with the existing administration of justice; they see no evil; things proceed very well. So in the present case, though the property of insolvents under the management of the sheriffs, especially where it should consist of choses in action and claims requiring adjustment, might not amount to so much by ten or twenty per cent. as it would under different management, still the evil is not of a description to make a distinct impression. Its operation is

negative, and in order to be understood and estimated, in all its extent, requires to be made the subject of particular investigation. The elasticity and power of adaptation to circumstances, in the human character, and in institutions, is however such, that a satisfactory judgment cannot be formed of any regulation, by considering it abstractly; for it will often be so modified in practice and so accommodated by habit to the existing wants and course of business of a community, that its defects will be remedied. And this may possibly be the case with the particular provision of which we are speaking.

Both the civil law and all those into which insolvent and bankrupt systems have been incorporated, are uniform in saving the liens acquired by acts of the bankrupt previously to the act or declaration of bankruptcy or insolvency, though a lien by judgment unexecuted is not protected in England. This is not a preference of the creditors, whose liens are thus respected, for they have an indisputable right to liens honestly acquired by contract with the debtor. To these are added often some preferences by operation of law. Such is the preference generally given to debts due to the government. And the acts of congress of 1797, c. 74, s. 5; U. S. Laws, Story's ed. p. 465, and 1799, c. 128, s. 65, id. p. 630, give the United States such a preference in cases of the assignment of *all* the debtor's property for the benefit of his creditors. U. States *v.* Hooe, 3 Cranch, 73—91.

The equity of any such preference may be justly questioned, unless it is accompanied by a lien of which other creditors may have notice. The property with which the debtor is entrusted by the United States, on bonds for duties, is as much a ground of obtaining credit with others, as that which is obtained from other credits, and since the debtor's visible property may reasonably be presumed to be one ground of the credit given him, it is as wrongful in the government to trust him with property, maintaining all the while this secret preference, as to permit any other creditor to gain such a priority. The debt is due to the whole community, and is not the whole community as able to take its proportion of the loss by the failure of its debtor, as his other creditors? At least their preference ought not to extend beyond the cases of debts of a public nature, of which any one may have notice by inquiry. There have been instances of debtors obtaining the use of an immense capital by means of the credit given on im-

portations, and these credits have, in some instances, enabled insolvent importers to maintain an appearance of wealth for a long time after becoming insolvent. It may be said, that in this case, the debts may be ascertained by applying at the custom house. But we do not know of any obligation on the custom house officers to disclose to all persons inquiring, the amount of bonds due from any importer, and these bonds are scattered in different ports, so that the amount of them cannot be ascertained but by an intimate acquaintance with the importer's business, and the knowledge of their amount at any one time is a very imperfect guide, since it is constantly varying. Where a piece of land or a house is pledged to the government for the tax assessed upon it, any purchaser having notice of this lien by the law, is put upon his guard, and it is his negligence if he purchases and pays the full price without first ascertaining whether the tax is discharged, and he knows where to make application for information of the fact; and so may any one, who gives credit to the owner, ascertain the existence of this lien, if he will inquire. If imported goods were invariably continued in the original packages in which they are imported, until after the expiration of the credit on the duties, there might be some excuse for a law which should create a lien on the goods for the duties until paid, for the law itself would be notice to purchasers. There would then be some basis for a preference. But to give a secret lien in behalf of the government, is allowing in favor of the whole community an unfair inequality, and the violation of a general principle, which would be considered quite inadmissible in behalf of any of its members. It may be urged that under a contrary doctrine the government would often be defrauded by its debtors; but this consequence might be prevented by never giving credit except in those cases where a specific lien can be preserved, which any one may be able to trace by inquiry.

The kind of debts which may be proved under an insolvency or bankruptcy, is not very accurately defined in the various systems of insolvency of the several states; and according to the best information we can obtain, this subject seems to have received much less attention than would have been naturally expected, in the administration of laws of so long standing as those of some of the states. In this respect, as well as in many others, there is no distinction, in principle, between a bankrupt and

an insolvent law. The difficulties in this part of the subject arise principally in regard to debts depending on future contingencies. The administration on the insolvent estates of deceased persons, affords rules applicable to that of similar estates of living insolvents. But the English bankrupt law makes a distinction, since, though provision is expressly made for such debts, particularly policies of insurance underwritten by the insolvent, yet, in practice, the general principle is adopted, that all debts which become absolute and can be liquidated, while the commission remains open, may be proved; whereas the reverse of this rule seems to be the more just, that the commission shall be kept open until all contingent obligations of the debtor shall have become absolute or be discharged, or settled by composition with the assignees. There is, however, one general class of exceptions to this rule, and it is a case of diversity between the settlement of the estates of living and deceased insolvents, since the decease of the obligor makes it necessary to bring some contracts to a conclusion, which, while he is living, may well enough remain open, such for instance as are the ground of new considerations and obligations of payment, arising from period to period successively, as leases for years with stipulations for annual rents, in respect to which the rule under the English bankrupt law is, that the landlord may recover of the bankrupt, after his discharge, the rent for the current quarter during which the bankruptcy happened. Here a part of the consideration and the entire obligation of payment accrue after the bankruptcy, though the contract was made before. Upon the same principle in Boorman *v.* Nash, 9 B. & C. 145, where an agreement having been made for the purchase of some goods, and before the time agreed on for the delivery of them, the vendee became bankrupt,—it was held that the vendor was not prevented by the bankruptcy and certificate of the bankrupt, from maintaining an action for the loss by the fall in the market at the time when the goods were to have been delivered. The transaction, considered as a ground of obligation and suit, was held to be subsequent to the bankruptcy, though the agreement was previous. We have, under this distinction, a general class of contracts and mutual rights and obligations, which, in the law of a deceased insolvent, must be adjusted by his executors, but which, in case of a living insolvent, do not go to the assignees, but survive to the contracting parties. In other respects the rules of settling

estates of both descriptions are very similar. A case occurred in the English court of common pleas, two or three years ago, under the insolvent law of 1821, in which the right of jurisdiction in the administration of an insolvent's estate was brought in question between the court having administration of the estates of persons deceased, and the Insolvent's court. The insolvent having made an assignment of his effects to the 'provisional assignee' of the latter court, died before this assignee had transferred the property to other definitive assignees appointed by the court, and a question arose whether an assignment of the estate should be made by this 'provisional assignee' over to the assignees appointed by the court, to be administered upon for the benefit of the creditors under the insolvent laws; or the estate be administered upon by the courts that would have had jurisdiction if no assignment had been made by the insolvent; the only doubt being whether this provisional assignee held the property for the benefit of the creditors, or as trustee of the debtor; and he was held to be the trustee of the creditors, and that the estate should be administered upon as if the insolvent had been living, and Burrough, J. said it was not necessary to this effect that the provisional assignee should have accepted the appointment. Willis and others, assignees of Elliott *v.* Elliott, 4 Bing. 392.(*a*)

A question is stated by Wassenaar, cited by Voet, whether under the civil law as administered in Germany, the insolvent can, after a cessio bonorum, commence a suit in his own name and for his own benefit for damages on account of a personal injury, as for instance, trespass *vi et armis*, committed before the proceedings on the subject of insolvency, and he and Voet both agree that he could not, and the latter complains of the law as accumulating forfeiture upon misfortune on the insolvent. Voet ad. Pand. 42. 3. 10.

Such are some of the general questions arising on the subject

(*a*) The Dutch have, or at least had, some peculiar laws in regard to the widow's assuming her husband's liabilities after his decease, as she does if she takes possession of his property. If, therefore, she intends not to become responsible for her husband's debts after his decease, which she will of course wish to do if he dies insolvent, she must quit his house immediately after the celebration of his funeral, or rather she must leave it with the funeral and not return. And to signify her abdication of all claim to his property, she is to lock the house and put the key upon her husband's bier, thereby making, as Groenewegen says, a symbolical waiver of all claim to his property, in the same manner as, by the civil law, a delivery of the key of a ware-house, is a delivery of its contents.

of insolvent laws, which we have thrown out in a desultory manner, not intending to treat the subject with a rigid method, much less to exhaust it, but merely to call attention to it, and supply the means of an acquaintance with its most striking features and leading doctrines. We are induced to do this from an expectation that the systems of insolvency in several of the states will ere long be made the subjects of discussion and revision, and we shall, with the same view, state, in some detail, the provisions of some bankrupt and insolvent laws, which, those of our readers who were not already familiar with this subject, will examine with more curiosity and interest, after these preliminary inquiries and suggestions.

The Roman *cessio bonorum* is the root from whence all the bankrupt and insolvent laws spring. Most of the systems of insolvent laws are strictly the *cessio bonorum* of the civil law, whereby an insolvent debtor was permitted, by assigning all his property for the benefit of his creditors, to be exempted from imprisonment on account of any debt owed by him at the time of making such assignment, except debts due to the government, and some few others. The collectors and farmers of the public revenue, were the principal public debtors, and they still were liable to imprisonment for such debts, notwithstanding their insolvency, though instead of confinement in the common prisons, they were subjected only to a military arrest. Among the Romans, as in modern times, the government considered itself a privileged creditor, and entitled to the prior payment of its whole claim. Until, therefore, the debtor could first satisfy the entire demands of the government, he had nothing to cede to his other creditors. And the Roman law, like the modern insolvent laws, did not allow this privilege in respect to debts for penalties accruing on the commission of offences, for the law *De vocando in jus*, provides that if the offender could not satisfy the penalty in money, he should satisfy it in punishment; *si in ære non habeat, in pelle luit.*

The *cessio bonorum* was made with very little formality, the debtor might apply to any court for this purpose, but was not required to do so, for, by a law of Theodosius, he might make a verbal declaration to his creditors to this effect, or send them a letter or a verbal message merely, which would be a sufficient act on his part, to which the law gave the force of an assignment, if the creditors chose to take the benefit of it as such, and did not give him further time, if he so requested.

All the modern laws require the cession to be made under the direction of some court or magistrate, and give, as a reason for requiring this publicity, the motives to honesty, prudence, and frugality thus held out to others by the mortification and disgrace to which insolvency would expose them. A French ordinance of the fifteenth century made special provision respecting the ceremony, requiring that the debtor should come into open court bare-headed and without his sword.

The *cessio bonorum* might be made in form, though the debtor had nothing to cede, but his person would nevertheless be exempt from arrest for all debts then contracted, though his future acquisitions, over what was necessary for his support and that of his family, according to his quality and degree, continued liable for the satisfaction of his debts. In this respect it was, therefore, precisely equivalent to our poor debtor's oath in those states which have no insolvent laws, or rather no other regulation on the subject of insolvency, for the law providing for a discharge on taking such oath, is in fact an insolvent law, though of the most limited kind. It is, as we see, one form of the practical operation of the *cessio bonorum*.

The English insolvent laws and those of some of the United States, have occasion for the use of *he* or *she*, *his* or *her*, in reference to the debtor, which of course involves the rule that a woman may be arrested for debt, in which respect they differ from the more gallant spirit of the Roman law, by which the arrest of a female for debt was not permitted, and females accordingly had no occasion to claim this privilege. In this respect a number of our states have followed the Roman precedent.

A distinction is made between insolvent and bankrupt laws. Leeuwen uses the word *bankrupt* to mean a fraudulent debtor; *illi, qui bona sua evehendo, latitarunt, vulgo*, BANCO-RUPTORES. But this is not the prevailing distinction. The distinction as to the person is, that a *bankrupt* is an insolvent *merchant*, or one who gets his livelihood by buying and selling, as the term merchant is construed under these laws. Such is the application of the term, under both the English and French law. Whereas any other person not having the means of satisfying his debts, is simply an *insolvent debtor*. But a distinction in principle, of no small importance, is made between bankrupt and insolvent laws; since, by the former, the merchant, or debtor who gets his living by trading, may, by surrender-

ing his property, and upon compliance with certain other conditions according to the provisions of the various codes, be discharged absolutely from his debts, which are totally released and extinguished by the operation of the law; whereas other insolvents can only be discharged from imprisonment, while their future acquisitions will still remain liable. As to the forms of assignment, modes of administering and distributing the effects, the two species of laws are substantially the same. By way of illustration and comparison, therefore, we shall give abstracts of laws of both descriptions; considering them to be branches of one system in regard to general provisions and administration, though their objects and limits are not precisely the same. We borrow the abstract of the French and English bankrupt laws from Dr. Lieber's deservedly popular Encyclopædia Americana, now publishing by Messrs. Carey & Lea.

French Bankrupt Law. 'By the French mercantile law, a bankrupt merchant must, within three days after stopping payment, give notice of it to the tribunal of commerce, which, even if the notice is not given immediately, proceeds, at the request of the creditors, or by virtue of its own authority without any petition, or on motion of the king's *procureur*, to put the debtor's store-house, counting-house, effects, books and papers under seal, also to appoint a commissioner from its own body, and several sworn agents, who give security for the faithful discharge of their trust, and to put the bankrupt in prison or under arrest and *surveillance*, from which, however, after an investigation of his affairs, he may be released, either unconditionally, or on giving bail. From the day of his failure, the bankrupt is divested of all his interest and title in his property, and, during the ten days preceding, no one can acquire any right in it, by pledge or mortgage; and any gratuitous transfer by him during that time is void, and any transfer made for consideration may be annulled, if attended with circumstances indicating fraud. And all acts done or contracts made by him, in fraud of his creditors, are void. An advertisement of the bankruptcy must be posted up in public places, and inserted in the gazette. The agents above-mentioned continue to manage the affairs of the bankrupt only fourteen days, or until the appointment of the provisional *syndics* (trustees). The commissioner, within three days after the bankrupt's leger has been put into his hands, makes a catalogue of the creditors, and convenes them by means of letters and the public papers. The creditors assemble at the fixed time and place, in the presence of the commissioner, to whom they deliver a list containing three times as many names, as, in their opinion, there should be persons appointed provisional trustees *(syndics provisoires)* of the property.

From this list the requisite number is appointed by the tribunal of commérce. Within twenty-four hours after the appointment of trustees, the functions of the agents cease, and they render their account to the trustees, who, under the superintendence of the commissioner, now have the management of all the affairs of the bankrupt. They immediately remove the seals, and take an inventory of the bankrupt's effects, in the presence of a justice of the peace, with the aid of the bankrupt. Within eight days from entering upon office, they render to the king's *procureur* a report of the state of the bankrupt's affairs, and take charge of, and administer upon, his estate. The moneys received are placed in a chest with a double lock, of which the oldest trustee has one key, and the other is given to a creditor, selected by the commissioner. Every week, the commissioner is furnished with the cash account of the trustees, and may, upon their suggestion and that of the creditors, if he thinks it advisable, put the money already received at interest. It is the duty of the trustees to call in the debts of the bankrupt, and to have any mortgages made to him recorded, if he has not had it done himself; likewise to summon, without delay, all the creditors, by letter or the public papers, to appear before them within forty days, personally or by attorney, to prove their claims, present their vouchers, or deposit them with the tribunal of commerce. The examination of claims is made within fourteen days after the expiration of the forty days, and every creditor whose claims have been allowed, is at liberty to be present at the discussion of others' claims, and offer objections. After the claims have been discussed, each creditor must deliver, within eight days, an affidavit to the commissioner, that his demands are true. Whether a process shall be allowed, to establish the contested claims, rests on the decision of the tribunal of commerce. After the expiration of the time fixed for allowing claims, it is the duty of the trustees to take note of the creditors who do not appear; the commissioner gives information of them to the tribunal of commerce, which now assigns an additional period for their appearance, which, in respect to inhabitants of the kingdom, is regulated by the distance of their residence, one day being allowed for every three *myriametres*, about 18 2-3 English miles. In cases of foreign creditors, longer delays are allowed. After the expiration of this period, those who do not appear are excluded from a future dividend. Within three days after the period assigned for making affidavit, the creditors whose claims are allowed, are convened, and the state of the bankrupt's property is laid before them in the presence of the commissioner and the bankrupt. This is the time for the accord, which may take place if acceded to by the majority of the creditors, the sum of whose claims constitutes at least three fourths of the amount of debts to be liquidated. Creditors who hold collat-

eral security for their debts have no voice in the decision. In case of presumption of fraud, from an examination of the bankrupt's books and papers, no accord is valid. If an accord is made, it must be signed during this sitting. Whoever is against it, is allowed a space of eight days to exhibit his objections. The accord, when legally ratified, restores the bankrupt to his former situation. If no accord is effected, the assembled creditors have to appoint definitive trustees (*syndics definitifs*), and a cashier to receive the moneys arising from the income or sale of the bankrupt's property. The duties of these definitive trustees are the same with those of the provisional trustees and the agents whom the[illegible]cceeded; and the provisional trustees account and transfer the[illegible]airs over to the definitive, in the same manner as the agents had done to them. Monthly reports are made to the commissioner, who now has to fix the dividends. Prior to the final division, the creditors are convened, under the superintendence of the commissioner, and the final account is submitted by the trustees. The commissioner, on the suggestion of the syndics, assigns to the bankrupt's family their apparel and household furniture. Wives, married with a stipulation for separate property, or for community of goods accompanied with a separate interest in immovable property, retain the estate to which they are thus entitled, and also such as may have accrued to them by succession or donation. They are also entitled to retain personal property acquired by them, if it is the proceeds of such estate, and the right to employ such estate has been secured to them at the time when it came into their possession. Except in such cases, the presumption of law is, that property acquired by the wife has been paid for from the estate of the husband, and it is to be considered as belonging to him, unless she can substantiate her claim to it. She has a right, however, to articles of dress and furniture proved to belong to her by the marriage contract, or to have fallen to her by inheritance. Goods sold to the bankrupt may be reclaimed by the vender, if they are still *in transitu*, and not yet delivered at the store-house of the bankrupt, and have not been sold by him on authority of the bill of lading, or other sufficient authority. But all the bankrupt's advances for freight, charges, &c., on account of the goods, must first be refunded. And so the price, for which the goods consigned to the bankrupt for sale, on account and risk of the consignor, have been sold by him to third persons, may be claimed by the consignor, if it has not been paid to the bankrupt, or passed into the accounts between him and the consignor. The simple bankrupt (that is, he who is convicted of mere negligence) is liable to imprisonment for a time not less than one month, nor more than two years. The fraudulent bankrupt is condemned to hard labor (*travaux forces*) for a definite time.'

English Bankrupt Law. The English laws on the subjects of bankruptcy and insolvency, have recently been very elaborately revised. 'By the English statute of 6 Geo. IV, it is made an act of bankruptcy for a debtor to depart the realm, remain abroad, leave his house, shut himself up in his house, suffer himself to be arrested for a debt not due, yield himself up to be put in prison, suffer himself to be outlawed, procure himself to be arrested or his goods to be attached, or make transfers of his lands or goods, *with intent to defraud his creditors.* So it is an act of bankruptcy in a debtor, on commitment for debt, to lie in prison twenty days, or escape from prison. A man may become a bankrupt, also, by declaring himself such at the bankrupt office. Where the debtor does not so declare himself bankrupt, proceedings are commenced against him as such, on petition to the chancellor, by one creditor to the amount of £100, or two or more to the amount of £150. And in case the petitioners do not establish the bankruptcy, they are liable for the costs of the proceedings, and damages to the party petitioned against. The act extends to aliens, denizens and women. On a petition being made, the lord chancellor appoints commissioners, to take charge of the body, lands and effects of the party petitioned against. These commissioners proceed to take testimony that the petitioners are creditors, that the debtor is a merchant or trader within the meaning of the statute, and that he has committed an act of bankruptcy. These facts being established, they adjudge that he is a bankrupt, and give notice thereof in the London Gazette. The commissioners are invested with ample powers for getting possession of the bankrupt's person and effects. They assign all his property, real and personal, to assignees appointed by themselves, and these assignees subsequently assign it over to other assignees, appointed at the second meeting of the creditors, in case of such other assignees being so appointed, and approved by the commissioners. Creditors, whose debts are not due, are allowed to prove them, discounting interest. Sureties and bail for the bankrupt, when they pay the whole debt for which they are bound, may represent their claims under the commission, and receive the dividends that would otherwise have been assigned to the party to whom they pay the debt, even if it is not paid until after the commission issues. Persons holding policies of insurance signed by the bankrupt, may also present their claims, and if the contingency, whereby they would be entitled to a loss, happens before the commission is closed, their claims will be allowed. An annuity creditor is also admitted to prove; likewise sureties on an annuity bond, and any creditor whose debt depends on a contingency, if the contingency take effect pending the commission. The conveyance made to the assignees will transfer to them, for the benefit of the creditors, all goods of any other person in the pos-

session of the bankrupt at the time of the failure, and, by permission of the owner, reputed to belong to the bankrupt. Conveyances and transfers made by the bankrupt after he shall have been insolvent, except upon consideration of marriage, or other good consideration, are void, and the property so transferred is disposed of by the assignees for the benefit of the creditors. The assignees may, at their election, assume any subsisting lease held by the bankrupt, or any agreement by him to purchase lands. The bankruptcy dissolves articles of apprenticeship entered into with the bankrupt; and if he has received any apprentice's fee, on account of taking an apprentice, a part or the whole of it is returned by the commissioners. The assignees may execute any powers vested in the bankrupt, which he might have executed for his own benefit. If the bankrupt was trustee of property, the chancellor appoints others in his stead. Conveyances by, and contracts and transactions by and with, the bankrupt, *bona fide*, and executions levied more than two months before the issuing of the commission, though after the act of bankruptcy, are valid if the other party had no notice of the previous act of bankruptcy. Payments made at any time before the bankruptcy are also valid. The creditors appoint a receiver of the money, the proceeds of the bankrupt's property. The money must be vested in exchequer bills on interest, if so directed by the commissioners. The first dividend is made at the end of twelve, and the final one at the end of eighteen months. In case the bankrupt does not surrender himself within forty-two days after notice, or appear, as required, from time to time, to be examined on oath before the commissioners, or does not discover all his property, or deliver up all his books and papers relating thereto, or conceals and embezzles property to the value of £10, or papers relating thereto, he is deemed guilty of felony, and liable to be transported for life, or for a term not less than seven years. During his examination, an allowance is made to him for the support of his family. The bankrupt is absolutely discharged from all his debts and liabilities subsisting at the time of his becoming bankrupt, in case of his obtaining, and the lord chancellor's allowing, a certificate of four fifths in *number and value* of creditors to the amount of £20 each, or, after six months from the time of his last examination, of three fifths in *number and value* of such creditors, or nine tenths in *number*, that he has duly surrendered, and in all things conformed to the requisitions of the act. All contracts to induce creditors to sign the certificate are void. But, if it be a second case of the debtor's bankruptcy, his certificate will not exempt his future property and earnings from liability to his creditors, unless the dividends amount to 15*s.* in the pound. A bankrupt who obtains his certificate, if the dividends amount to 10*s.* in the pound, is allowed 5 per cent. on the amount, not exceeding £400; and if

the dividends amount to 12*s.* 6*d.* in the pound, he is allowed 7 1-2 per cent., not exceeding £500; and if the dividends amount to 15*s.* in the pound, he is allowed 10 per cent., not exceeding £600: but if they are less than 10*s.* in the pound, he is only allowed such sum as the assignees and commissioners may think fit, not over 3 per cent., nor exceeding £300. But the bankrupt is not entitled to a certificate, if he has lost, in gambling, within 12 months, £200, or £20 in any one day in that time; or if he has lost £200 in stockjobbing, or has caused false entries in his books, and mutilated or falsified papers to defraud his creditors, or connived at any person's proving a fictitious debt under the commission. If the bankrupt or his friends propose a composition which is accepted by nine tenths of his creditors in number and value, the commission of bankruptcy will be superseded.'

Insolvent Laws of England. Until the latter part of the reign of George III, the insolvent acts of England were the stat. of 32 Geo. 2, c. 28, commonly called the Lords' Act, from the circumstance of its originating in the house of lords, and two or three short acts, passed from time to time, in addition. These acts provided that *any person* being charged in execution for any sum [over £20 and] at first not over £100, afterwards £200, and finally by 33 Geo. III, c. 5, £300 in the whole, including the amounts due upon all the executions, might petition the court out of which the executions issued, to be discharged, making a schedule and assignment of all his estate for the benefit of his creditors *who had charged him in execution*, whereupon he should be discharged, unless one creditor insisted on his detention, and would stipulate to allow him 3*s.* 6*d.* (by stat. 37 Geo. III, c. 85, s. 2) or more than one, 2*s.* each, a week. One or more creditors might detain him in prison as long as they would pay the above amounts for his support. Those acts extended to cases of imprisonment, for costs or not performing an award; they did not apply to a debt for alimony, nor a judgment in a *qui tam* action, or for a penalty for violation of law, or debts due to the crown. They were not limited to cases of a voluntary petition for a discharge by the prisoner, but provided that if he should not make a petition of his own motion, the creditors might have him brought before the court; and if he thereupon refused to make an assignment of his effects for their benefit, he was liable to be transported for seven years. The prisoner might be compelled to insert in his schedule every thing that he could sell, as, for instance, his place as a life-guardsman; though an officer could not be compelled to sell his right to

full or half pay. If he made a false schedule, besides suffering the penalty of perjury, he forfeited all benefit of the act, both on that occasion and afterwards. The debtor, on being discharged, was not liable to be again arrested for the same debts. But his future acquisitions were still liable for the same debts, excepting (what he also had a right to except from his assignment) necessary beds and clothing for himself and his family, and tools of his trade not over £10 in value. No creditors were obliged to become parties to this assignment, and those who had not arrested the debtor and did not become parties to the proceedings and discharge, were not affected by these statutes, but might arrest him afterwards on a previously existing debt, in the same manner as if no such proceedings had taken place. This, however, did not increase the dividends to those who were parties, for the share of the proceeds of the prisoner's effects, which would have gone to the other creditors, if they had become parties, was paid over to the prisoner himself.

Mr. Ellis, in his treatise on the laws of debtor and creditor, says, the act of 33 Geo. III, c. 5, commonly called the Small Debtors' Act, *of equally humane tendency* with the Lords' Act, allowed a debtor imprisoned on execution for any sum not exceeding £20, to be discharged in like manner, *after having been in prison a year*, his future acquisitions remaining still liable for the debt. But humanity is certainly not the most striking feature of a law which permitted a creditor to keep a debtor imprisoned his whole life by paying 2*s*. a week for his support, when he confessedly had no property wherewith to pay the debt, and when it did not appear whether his inability to pay might not have arisen from a mere misfortune; or a law which permitted a debtor imprisoned for less than £20 to discharge himself on oath, only after suffering imprisonment for one year, and still leaving his future acquisitions liable. After reading the mild and compassionate language in which Voet and the other civilians speak on this subject, one is forcibly struck with the hard and rigid sentiments of the sages of our common law. Who, that had not been schooled in its rugged maxims on this subject, would think of the 'humane tendency' of a law which liberated a man from prison after being in a jail a whole year on account of a debt of less than £20, for no conceivable benefit. It would be quite as humane to punish every insolvent debtor by whipping or the

pillory, without regard to his honesty or fraud, and then dismiss him to go about his business for the support of himself and his family. What appears to be a more reasonable doctrine, is, that the law should be somewhat sparing of punishment in these cases, until it shall institute some mode of distinguishing cases of fraud or blameworthiness, from those of unavoidable misfortune, or excusable miscalculation.

But these laws were confessedly inadequate to the purposes contemplated by the legislature, and accordingly in 1826 an act was passed, consisting of ninety-one sections, and enlarging and altering the former acts in various respects, and presenting altogether a specimen of very systematic and elaborate legislation, commensurate with the importance of the subject in so commercial a country as Great Britain. The act of 53 Geo. III, c. 34, (1812) had given the respective courts of sessions in the several counties, jurisdiction on this subject. The act of 1819 constituted a new court consisting of four commissioners, who sat in London; but as all the cases in the kingdom could not be settled there, the act authorized this court to refer any cases to the courts of session, the decisions of which being reported to the Insolvents' Court, were there registered and executed by that court. But this was evidently a very clumsy judicial organization, and, accordingly, the whole jurisdiction is by the act of 1826 conferred upon the Insolvents' Court, three of the commissioners of which are to make circuits in the various counties three times a year; the times of holding these courts to be previously advertised. A provisional assignee is appointed as a standing officer of the court, to whom all assignments are to be made, and who afterwards assigns over to the definitive assignees upon the order of the court to this effect. We will enumerate the leading provisions of this latter act.

Who may petition. Persons in custody [within the walls of a prison, s. 12] for debts, damages, or costs, sums of money, or by reason of contempt of any court, by not paying costs or otherwise, may, within fourteen days from the commencement of the custody, or such time thereafter as the court may think reasonable, apply to this new court for a discharge. Geo. IV, c. 57, s. 10. [Here is no limit, as in the former acts, of the amount of the debts on which the debtor must be imprisoned, nor of the time of the application.]

What the petition must state. His petition must state when

he was imprisoned, where, at whose suit, and for what amount; whether he has before taken advantage of a bankrupt or insolvent law in England or abroad; and the debtor prays for a discharge from arrest on those debts, 'and against the demands of all persons who shall be or claim to be creditors of such prisoner at the time of presenting such petition.' s. 10. [This is another great alteration of the law, as the previous acts only discharged him against the demands of such as voluntarily became parties.]

Assignment.(a) He shall make an assignment at the same

(a) *Form of the Assignment.* The statute of 1826 prescribes the general form of the assignment, which we insert, as its provisions may be of some practical convenience by suggesting those in similar instruments in the states which have insolvent laws that do not prescribe the form of the assignment.

This indenture, made the day between [the debtor] and [the provisional assignee] &c. witnesseth that he [the insolvent] hath this day subscribed his petition to the court for the relief of insolvent debtors, praying for a discharge by virtue of the act, &c. and that in obedience to said act, he, the said hath conveyed, assigned, transferred, and set over, and by these presents doth convey, assign, transfer, and set over unto the said as such provisional assignee as aforesaid, his successors and assigns, all the estate, right, title, interest, and trust of the said in and to all the real and personal estate and effects of the said both within this realm and abroad, in possession, reversion, remainder, or expectancy, except the wearing apparel, bedding, and other such necessaries of the said and his family, and the working tools and implements of the said not exceeding in the whole the value of twenty pounds, together with all deeds, evidences, and writings, touching and concerning the said estate and effects, and every part thereof, and all future estate, right, title, interest, and trust of the said in and to all real and personal estate and effects within this realm and abroad, which the said shall purchase, or which shall revert, descend, be devised, bequeathed, or come to him, in possession, reversion, remainder, or expectancy, before he shall become entitled to his final discharge in pursuance of said act; and in case the said shall obtain his discharge from custody, without any adjudication being made, in the matter of his petition, then before he shall be at large and out of custody, together with all deeds, evidences, and writings touching and concerning the same and every part thereof, and all debts due or growing due to said or to be due to him before he shall become so entitled, or be so out of custody as aforesaid; to have and to hold, receive and take all and every the said estate and effects of the said real and personal, in possession, reversion, remainder, or expectancy of every nature and kind whatsoever, except as aforesaid; and all and every the said estate and effects which shall be so purchased by the said or which shall revert, descend, be devised, bequeathed, or come to him as aforesaid, in possession, reversion, remainder, or expectancy, of every nature and kind whatsoever, conveyed, assigned, transferred, and set over, or mentioned, or intended, or directed by the said act to be hereby conveyed, assigned, transferred, or set over, with their and every of their rights, members, and appurtenances, unto the said his successors and assigns, according to the respective natures, properties and tenures thereof, in trust nevertheless to and for the use, benefit, and advantage of the creditors of the said who shall be entitled to share in a dividend of the estate and effects, under the provisions of said act, and to and for such other uses, intents, and purposes, and in such manner

time to the provisional assignee of the court, of all his property, excepting wearing apparel, bedding, and other necessaries for himself and family, not exceeding £20, such assignment to be void unless the petition is allowed. s. 11. [The value of 'necessaries' allowed to be retained is double the former amount.]

Allowance to the debtor for his support. The court may order a sum, according to its discretion, to be allowed to the prisoner out of his effects, for his support, and that of his family, during his confinement, while his petition is pending. s. 17.

An assignment by the provisional assignee, is made, by the order of the court, to the permanent assignees, as soon as the latter are appointed by the court, and have signified their acceptance of the trust. s. 19.

Sale—Meeting of creditors. The property is to be sold 'with all convenient speed, by public auction,' after thirty days public notice; and the sale is to be made 'in such manner, at such time, and at such place or places, as shall be approved in writing by the major part in value of the creditors,' at a meeting called by fourteen days' previous notice in the newspapers. s. 20. Every creditor is entitled to vote upon the balance due to him, after allowing all set-offs, and in case of any dispute about the amount, it is to be settled by one of the commissioners of the court, whose decision is conclusive as to the right of voting, but does not prevent the creditor from establishing a greater amount on which to claim a dividend. s. 25.

Property may be mortgaged by the assignees. 'Whereas persons petitioning the said court for relief under this act may be entitled to annuities for their own lives, or other uncertain interests, or to reversionary or contingent interests, or to property under such circumstances that the immediate sale thereof for the payment of their debts, may be very prejudicial to them, and deprive them of the means of subsistence, which they might otherwise have after the payment of their debts; and it may be proper in some cases to authorize the raising of money

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and form, as are in and by such act expressed of and concerning the same. as by said act, reference being thereunto had, will more fully appear; provided always, and these presents are upon this express condition, nevertheless, that in case the petition of the said shall be dismissed by the said court, then these presents, and the conveyance and assignment herein before made as aforesaid, shall from and after the dismission of such petition, be null and void to all intents and purposes, any thing to the contrary herein notwithstanding. In witness, &c. s. 91.

by the way of mortgage for the payment of their debts, or part of the debts of such person, instead of selling the property of such person for that purpose ;'—the court may order, in such case, that the assignees shall delay the sale of any part of the property, or raise money upon it by mortgage for the payment of the prisoner's debts, instead of selling it. s. 21.

Assignment of powers. Where the insolvent has a power coupled with an interest, the assignees may execute such power in his stead. s. 22.

Leasehold estates. The assignees may accept or decline to accept leases held by the insolvent. In case they accept a lease, the debtor is thereby exonerated from future payment of rent to the lessor, and if they do not decide whether to accept it or not, the lessor may apply to the court to require them to make election, and in case of their declining the lease, to give up the instrument. s. 23. [This section was introduced in consequence of a case which occurred under the previous act of 1819, 1 Geo. IV, c. 119. Doe ex dem. Palmer *v.* Adams, 4 Bing. 348; in which it was held that a lessee whose property had been assigned to the provisional assignee, could not eject an occupier of the land, which was held to have passed under the assignment, although the provisional assignee had never taken possession, nor had any permanent assignee been appointed: Best, C. J. dissenting.]

Suits, compromises, and arbitrations. The assignees may bring suits in their own names, against the debtors to the insolvent, 'provided that no composition, or submission to arbitration, shall be made, or suit in equity commenced, without the consent in writing of a major part in value of the creditors.' s. 24.

Suits are not to abate on account of the death or removal of assignees. s. 26.

Income of beneficed clergymen or curates. The income of a curacy or benefice of any beneficed insolvent clergyman or curate, does not go to the assignees; but they may apply for the sequestration of the profits of the benefice or curacy, and a sequestration may be issued upon the order of the Insolvent Debtors' Court in the same manner as it might be upon a *levari facias.* s. 28.

Pay of military and naval and civil officers. Though the assignees are not entitled to receive the pay of civil, military, or naval officers, the court may assign to them a part of the

future pay or emoluments of such officer, with the consent in writing of the secretary at war, or other chief officer of the naval, civil, or military department to which the debtor may belong. s. 29.

Goods in possession of the debtor at the time of his arrest, belonging to others, but of which the debtor was (*by the consent of the owner*) the reputed owner, pass to the assignees to be disposed of as the goods of the debtor. Vessels mortgaged by the debtor, and remaining in his possession, but registered according to 4 Geo. IV, c. 41, or 6 Geo. IV, c. 210, are excepted from this provision. s. 30.

Distress for rent cannot be made on the goods of the debtor, after his petition, for any rent that accrued more than one year before the presenting of his petition. s. 31.

Voluntary references by debtor. [On this subject we quote the words of the act, for the purpose of giving the precise form of the provisions in this case, which is one of the most difficult to provide for.] 'If the prisoner shall, before or after his imprisonment, being in insolvent circumstances, voluntarily convey, assign, transfer, charge, deliver, or make over any estate, real or personal, security for money, bond, bill, note, money, property, goods or effects whatsoever, to any creditor or creditors, or to any person or persons in trust for, or to or for the use, benefit, or advantage of any creditor or creditors, every such conveyance, assignment, transfer, charge, delivery and making over,' shall be deemed fraudulent and void as against the assignees; if made within three months before the arrest, and with a view of petitioning as an insolvent debtor.' s. 32.

Any warrant of attorney to confess judgment, or cognovit actionem, made by the debtor to any person within twenty-one days before his arrest, is void as against the assignees. s. 33. And is of no force as giving any right against the goods of the insolvent after his imprisonment.

The amount in which creditors shall be entitled to a dividend, is to be conclusively determined by the Insolvents' Court.

Account by the assignees; their removal, &c. The assignees must account at the end of three months, s. 35, and the Insolvents' Court determines conclusively as to their accounts, s. 36, and may compel them to account, s. 37: *Removal of trustee*: And remove any trustee and appoint others, s. 38:

And may commit the executors or assigns of either of the assignees, in case of their refusing to assign or deliver over the property to the new assignees appointed by the court. s. 39.

Schedule. The debtor, within fourteen days after signing his petition, must give in a schedule of all his property and the debts due to and from him, and a list of his creditors. s. 49. [The discharge under this act relates to all the creditors mentioned in the schedule, in which it differs from 37 Geo. III, c. 90, s. 30, under which the discharge was held to extend only to creditors who had notice of the debtor's intention to petition for a discharge. Dimond *v.* Clark, 1 Chit. Rep. 222. The stat. 53 Geo. III, c. 102, s. 10, required that the discharge should name the creditors in respect to whom the prisoner should be discharged. Baker *v.* Sydee, 7 Taunt. 179. The present act requires the creditors to be named or described as far as the debtor can designate them. As to the sufficiency of this description in the schedule, under a similar provision of the former act of 1819, where an insolvent contracted for goods with A, the agent of a company, and after giving two promissory notes for the debt, amounting to £82 2*s.* 6*d.* took the benefit of the act, without describing the company as his creditors, and stating the debt to be only £82; it was held that the discharge was an answer to the action by the company on the notes. Forman *v.* Drew, 6 D. & R. 75, S. C. 4 B. & C. 15. So where the insolvent stated that A held his acceptance, whereas A had endorsed it over, but unbeknown to the insolvent, the description was held sufficient. Reeves *v.* Lambert, 4 B. & C. 214. Nias *v.* Nicholson, 2 C. & P. 120. S. C. 1 R. & M. 322. And when the schedule, by mistake, stated a bill to be drawn by the insolvent on M. whereas it was drawn by M. on the insolvent, it was left to the jury to say whether the same bill was meant, and if so, the discharge was held to apply to the debt. Nias *v.* Nicholson, supr.]

Hearing parties, &c. S. 41, 42, 43, 44, 45, direct the notice and mode of proceeding on the petition. In the case of Murray *v.* Reeves, at the January Sittings, 1828, 1 Chit. Eng. Stat. 600, n. Lord Tenterden, C. J. of the K. B. made a suggestion similar to the principle so tenaciously adhered to in the old French ordinance already mentioned, and inculcated by Voet; he expressed the opinion that one object in view of the legislature in these laws was example, by punishing a fraudulent debtor, and consequently that any stipulation by a

creditor to withdraw opposition to the debtor's discharge, for some valuable consideration, was void. See Nerot *v.* Wallace, 3 T. R. 17.]

The debtor's discharge. On the debtor's making oath to his petition and schedule, and executing a warrant of attorney for the purpose hereafter mentioned, the court, if it sees fit, decrees at what time he shall be discharged, and exempted from arrest by the creditors and on the debts mentioned in his schedule, and by creditors holding negociable contracts, the holders of which were not known to him at the time of making his schedule. s. 47. But the court is invested with a discretion as to liberating the prisoner.

Concealment of effects by the debtor, &c. If it appears that the debtor has fraudulently, with intent to conceal the state of his affairs, or defeat the objects of the act, destroyed, or prevented, or withheld the production of any books, papers, or writings relating to such of his affairs as are subject to investigation under this act, or made false entries, or omitted to make entries, or altered or falsified his books or papers, or writings, with the intention of diminishing the dividends among the creditors, or giving a preference to any creditor; or cancelled or concealed any debt, or charged, mortgaged or concealed any of his property after his imprisonment, the court may adjudge that he shall remain in prison at the suit of some one or more of the creditors, any period not exceeding three years. s. 48.

Debts incurred fraudulently or by misconduct. In case it appears to the court that any prisoner shall have contracted any of his debts fraudulently, by means of a breach of trust, or by means of false pretences, or without having had any reasonable or probable expectation, at the time when contracted, of paying the same, or shall be indebted for damage in any action for criminal conversation, or for seducing the daughter or the servant of the plaintiff in such action, or for breach of promise of marriage, made to the plaintiff in such action, or in any action for malicious prosecution, or for libel or slander, or any other malicious injury, or in an action for tort or trespass on the person, or shall have put his or her creditors to any unnecessary expense by vexatious or frivolous defence to any suit for recovering the same, and it shall appear to the court that the injury complained of was malicious, the court may order that in regard to the creditors to whom the debtor thus became indebted by fraud, or misconduct, he shall not be dis-

charged within such period as the court may see fit, not exceeding in the whole two years: s. 49: And that for such period he shall be confined within the walls of the prison, s. 52. [The greater part of this section is taken from the act of 1819, and is retained after seven years experience, so that it does not seem to have been found inconvenient in operation. It is a great desideratum in the laws of debtor and creditor, to distinguish more accurately and broadly, between debts and liabilities, honestly incurred, and those which are fraudulently, improvidently, or maliciously contracted. This distinction can be made, only by confiding a wide discretion to the court or jury; and why not confide it in this case, as well as in those of torts, trespasses, misdemeanors, and crimes? There is, in our laws in the several states, as we shall see when we come to analyze them, vast room for improvement in this respect. Some of them are defective by confounding the unfortunate and the blameable, and exposing them indiscriminately to severity and punishment; others again indiscriminately discharge both classes with impunity.]

Frivolous opposition to discharge. When any creditor makes a frivolous opposition to the prisoner's discharge, the court may award costs against him. s. 53.

The creditor to pay the expense of detaining prisoner. In any of the preceding cases of detention of the debtor on account of any debts ordered by the court, it may also, on application of the prisoner, order that the creditors, on whose debts he is so detained, shall pay the expense of his detention, not exceeding in the whole the amount of four shillings per week. s. 56.

The debtor to give warrant of attorney to the assignees to confess judgment for debts not satisfied. The civil law does not appear to make any very precise provision in respect to the outstanding unsatisfied part of the debts, after the division of the property, and the insolvent laws of the several states make in some cases no provision at all, or very imperfect ones, on this subject, leaving, for the most part, the creditors to seek a remedy against the debtor's property by such means as the general laws of debtor and creditor in the state, will supply, without the right of arresting the person. As the provision on this subject in the act in question, is of equal importance to both the debtor and his creditors, and appears to be convenient and effective, and also adapted to the practice in most of our

states, we extract it pretty fully, though we do not follow the language literally throughout.

Before any adjudication in the matter of the petition of any such prisoner, the said court shall require him to make a warrant of attorney, to authorize the entering up of judgment against such prisoner, in some one of the superior courts of Westminster, in the name of the assignee or assignees, or such provisional assignee, as shall have then been appointed, and shall have accepted such office, for the amount of the debts of such prisoner, which shall at the time of such order, remain due and unpaid to said creditors, and from which such prisoner shall be discharged by such order; and such judgment shall have the force of a recognizance; and the order of the court, to be established by virtue of this act, shall be a sufficient authority to the proper officer for entering up judgment. And when it shall, on the application of any creditor or otherwise, appear to the satisfaction of said court, that such prisoner is of ability to pay such debts, or any part thereof, or that he is dead, leaving assets for that purpose, the court may permit execution to be taken out upon such judgment, or put in force any other power given by this act against the property acquired by such prisoner after his discharge, for such sum of money, as, under the circumstances of such prisoner, the court shall order: Such sum to be distributed ratably amongst said creditors. And such further proceedings shall and may be had, according to the discretion of said court, from time to time, until the whole of the debts due to the several persons against whom such discharge shall have been obtained, shall be fully paid and satisfied, together with such costs as such court shall think fit to award; and no *scire facias* shall be necessary to revive such judgment, on account of any lapse of time; but execution shall, at all times, issue thereon by virtue of the order of such court. Provided always, that in case any such application against such prisoner, shall appear to the court ill-founded and vexatious, it shall be lawful for the court not only to refuse to make any order on such application, but also to dismiss the same with such costs, as to the court shall appear reasonable. s. 57.

Remedy as to property subsequently acquired. In case of the debtor's subsequently acquiring public stocks, or any species of property or interest, on account of which, in the opinion of the Insolvents' Court, he ought to make future payment towards

the satisfaction of the debts due at the time of his insolvency, for the remainder of which a judgment now stands in the name of the assignees, he may be committed to close confinement in jail until he shall make such payment, or transfer, as the court shall order. s. 58.

Remedy against subsequent debtors of the insolvent. In case any person or persons, body politic or corporate, shall, after the discharge of any such prisoner out of custody, become possessed of, or have under his or their power or control, any stock in the public funds, or any legacy or money due or growing due, bills of exchange, promissory notes, bank-notes, security for money, goods and chattels, and any other property whatsoever, belonging to any such prisoner, or held in trust for him, as for his use and benefit, or to which such prisoner shall be in any way entitled; or in case any person or persons, body politic or corporate, shall be in any matter indebted to such prisoner, it shall be lawful for such court, upon the application of any assignee or creditor of such prisoner, to cause notice to be given to such person or persons, body politic or corporate, directing him or them to hold or retain the said property until said court shall make further order concerning the same; and thereupon it shall be lawful for the said court to order such person or persons, body politic or corporate, to deliver over such property, and to pay such debts as aforesaid, or any part thereof, to the receiver of said court, or to the assignees of said prisoner, for the benefit of his creditors entitled to claim under such judgment entered up by order of said court as aforesaid. s. 59.

Discharge of person and new acknowledgment of the debt will not make the debtor liable to arrest. The discharge exonerates the debtor from subsequent arrest on account of the debts described in his schedule, except in the cases of fraud and misconduct, as before specified, and as it had been held in Sweenil *v.* Sharp, 4 Bing. 37, that a warrant of attorney, given by the debtor after his discharge, for a debt to which the discharge applied, renewed the right of the creditor to arrest the debtor, this act provides that such warrant or any new security given for the same debt, shall not revive the right to arrest. s. 61.

Persons having previously been discharged. Any debtor having taken advantage of this act, cannot again take advantage of it within five years, without the consent of three fourths

in number and value of his creditors, unless it shall appear to the Insolvents' Court that he has been industrious, frugal, incurred no unnecessary expenses, and has endeavored to pay his debts, and that his repeated insolvency arises from misfortune or inability to acquire subsistence. s. 64.

Rehearing in case of error. If the debtor has in any case obtained his discharge by false evidence, &c. the court may order a rehearing. s. 67, 68.

Prisoner becoming non compos mentis. If the prisoner, after arrest, becomes of unsound mind, the court may, on inquiry and ascertaining the fact, proceed to grant his discharge, on the assignment of his property, as provided in such case, without any petition, schedule, or the compliance, on his part, with the requisitions of the statute. s. 73.

Debts to the crown. The act does not extend to debts to the crown, without the consent of the treasury department. s. 74.

The remaining sixteen sections, give the Barons of the Exchequer jurisdiction in certain cases under this act; direct proceedings, and appoint fees in various cases; make certified copies of the records evidence; indemnify sheriffs for obeying orders of the Insolvents' Court; prescribe the manner of pleading the discharge, or pending of the petition; authorize the court to admit attorneys and make it contempt in any one to practice without such admission; and limit the amount to be paid proprietors of newspapers for inserting advertisements ordered by the court, to three shillings, and prohibit them from charging more than that sum for any one advertisement.

Insolvent Law of France. The subject of insolvency, as distinguished from bankruptcy, which occupies so many provisions in the English law, fills about two pages of the French code. It is, in substance, the *cessio bonorum* of the civil law. The cession is made either by agreement between a debtor and his creditors, or judicially by application to a court, and when made in this latter way it is defined to be a privilege accorded by the law to unfortunate but honest debtors, for the purpose of giving them personal liberty, but does not exempt their future acquisitions from the payment of their debts. It accordingly cannot be refused by the creditors. The debtor must deposite with the clerk of the court his schedule, his books, if he keeps such, and the evidences of his demands. This does not defeat, but only delays judgment in

the action previously commenced against him. This privilege is denied to aliens, persons having been guilty of selling pretended titles, fraudulent bankrupts, persons who have been convicted of larceny or swindling, and to guardians, and trustees, in respect to responsibilities incurred in those capacities. The mode of proceeding is not particularly described in other respects, but reference is expressly had to the accustomed forms and usages. This seems to be a part of the code on which the compilers bestowed very little labor, as they have omitted to digest and insert in the compilation a great part of the regulations which are recognised by the code itself as being in force.

The above laws supply an ample store of provisions on the subject of insolvency, by the introduction of some of which, we have no doubt, those of the several states might be improved. An examination of them will also facilitate a comparison and analysis of those of our states, to the consideration of which, particularly those of the recent New York revised law, we intended to have proceeded in this article, but the length to which we have already drawn out the subject, makes it necessary to stop at present. We intend to continue it in our July number.

Art. III.—PROBATE LAWS.

1. *The Probate Laws of Massachusetts, digested and arranged; comprising the subjects of Wills, Devises, Legacies, Dower, Descents, and Distributions, &c. With an Appendix of Forms.* By William Blair, Counsellor at Law. 1829.
2. *The Probate Directory, or a Complete System of Forms for the use of Probate Courts; together with Directions for Proceedings in the various stages of administering and settling Estates, according to the existing laws of New Hampshire, and containing the substance of the Probate Laws of Massachusetts and Vermont, and adapted to the practice in those states.* By a Counsellor at Law. *Concord.* 1829.

A history of the law of Massachusetts is still a desideratum. And in no branch of jurisprudence would it prove more

useful than in the application of the rules of descent or distribution of property upon the decease of its owners.

In some of our literary journals, will be found dissertations, or rather conjectures on its progress during the first years of the organization of civil society on these shores; but the mist with which time has enveloped it, has not been dispelled. The materials for its compilation were early scattered, and but few authentic relics or original memorials remain to shed their unerring light on the subject. Had a parallel been attempted between the laws of England and those of the colony, as they were from time to time compiled, with the reasons of the variation, in the manner in which it was done in 1646, at the period of the faction of Dr. Childs, we should have been able to have traced the cause of most of the differences between them which exist at this day.(a) The jurist and the antiquary must now indulge in their regrets; the vain wish cannot be gratified.

To every inquirer into our history, the question is presented, by what authority were laws established and administered by the first settlers? Some writers have considered the authority as resting upon the necessity which the emigration gave rise to: others, on the implied powers derived from the colony charter.

It has been contended that the charter was originally destined solely for the establishing of a corporation in England; and not for the government of a foreign territory; that its transportation across the Atlantic was in itself a forfeiture of it;—while, by others, it has been denied. What would be the legal consequences of such a measure was well considered by the grantees, when, in 1629, a number of their distinguished associates contemplated an embarkation. A committee was appointed to consult with counsel; their report, says Hutchinson, is not on record; but the opinion of Mr. White, one of the company, and a counsellor at law, was adopted, 'that the government and patent might be settled in New England.' Whether it went to the extent of holding that the charter authorized the removal and use of the patent here, or gave only a license to the adventurers to depart from the kingdom, and on their arrival in America it would leave them, by necessary implication, to govern themselves according to the common

(a) We have recently understood that this parallel or declaration, as the court termed it, is to be found on the *files* in the office of the Secretary of State, and *trust* that it will be made public.

law, so far as it suited their circumstances,—must rest in doubt. The former was probably the ground on which the majority of the company proceeded, and the latter, that upon which they acted after making the settlement.

The King's Bench, however, in six or seven years after, did not accord with them; and upon a quo warranto in 11 Car. 1, decreed the charter forfeited. The allegations were 'because Sir Henry Rosewell' (and all the Massachusetts Company,) 'used &c. in several ports beyond seas, out of this kingdom of England, without any warrant or royal grant, the liberties, privileges, franchises, &c. following:' and among others 'to transport out of England, beyond seas, his Majesty's subjects and others, and *them, at their will, to govern*,' &c.

The consequence of these proceedings was, that in April, 1638, the privy counsel directed an order to be issued by the Lords Commissioners for foreign plantations, to Mr. Winthrop, 'requiring and enjoining said Winthrop, or any other, in whose power the said letters patent were, that they fail not to transmit the said patent letters by the return of the ship.' A compliance with this order was evaded. And as the patentees out of England were not summoned, it was considered by the colonists that no binding judgment had been rendered against them. Winthrop's Journal, vol. 1. p. 274.(*a*)

From several passages in Winthrop's Journal, it would seem that doubts sprung up in the minds of the magistrates as to their powers; for in 1639, when they finally gave way to the deputies in consenting to frame a body of laws, the motives assigned by Winthrop as those by which they had been actuated, in opposing the project, were, 1. That they had not had sufficient experience as to what laws would be best fitted for their new condition; and, 2. 'That it would *professedly* transgress the limits of our charter, which provides we shall make no laws repugnant to the laws of England;' and he proceeds to observe, that 'to raise up laws by practice and custom, had been no transgression, as in our church discipline, and in matters of marriage, &c.'

What weight these scruples had is uncertain; the desire of retaining discretionary power in the hands of the assistants was unquestionably of some force. We find that criminal

(*a*) It was so viewed in the reign of Charles II., unless the former reversal was forgotten, for a new quo warranto was then filed; the writs of scire facias served here; and another judgment of forfeiture rendered.

jurisprudence had been exercised, not according to the law of England, but according to the discretion of the magistrates; they had been a law to themselves. Nor is it probable that these scruples strongly pressed them in regard to the rules of property. They could have reasoned, and probably did, with apparent justice on their side, that the freemen being interested in the joint stock, the manner of alienating and transmitting it to others, might well be regulated by the company of which they had voluntarily become members. The territory, indeed, was granted to be held, as of the manor of East Greenwich in Kent, in free and common soccage; yet in relation to the mode of holding it among themselves, nothing was prescribed by the patent. Besides, that instrument expressly invested them with larger powers than corporations in England possessed; and in the exercise of them, they chose not to adopt the custom of gavel-kind—preferring the rule of inheritance of the common law before the conquest. The county of Kent had never been subject to feudal tenures, and it was no very strained conclusion to suppose that where the custom did not prevail, the ancient law might. They did not receive the custom by which the inheritance would be divided among the sons only; they made it partible among all the children, subject to the support of the widow. Farther, the planting and governing of the colony was committed to them without expressly authorizing the erecting of judicatories, though the language of the charter did empower the governor and assistants to make ordinances for *settling the forms and ceremonies of magistracy fit and necessary for the plantation and inhabitants.* Without a precedent for their guide, their wants gave the rule of interpretation.

If the king could license the departure of his subjects to places where the writs of his courts did not run, and if the license did not by necessary implication authorize it, the law of self-preservation would vindicate the assumption of the powers of government. The assumption was questioned, but the powers were wielded nearly sixty years with the knowledge and acquiescence of the government of England. The situation of the parent state in that period, touches not the argument. Laws and usages were established or grew up affecting the rights and property of thousands. These could not be treated as nullities, and without the occurrence of the revolution in England, which brought William and Mary to the

throne, the colonial institutions must have been recognised as valid, and the colonists as dependent only in allegiance on the sovereign power of the mother country.

In no view ought the repeal of the charter to be considered as having abrogated their local laws. The opinion which has been advanced, that the repeal of the charter produced this effect, is (with deference to the source whence it emanated) subject to great doubt. It might possibly have the effect of preventing the further exercise of the powers of state by those to whom they had been entrusted, until the society was re-organised; but it would be indeed remarkable, if it left the people without a rule of action. The period for planting the colony was not limited; so none of the company could have been rightfully required to return to England, and thus be brought within the operation of the local laws of the parent state.

What, it may be asked, was the legal condition of the colonists from 1638? Or, if the repeal under the first *quo warranto* was absolutely void, and needed not to be reversed by writ of error, what became of their laws and usages from the 36 of Car. 2, to the time of issuing of the charter of William and Mary? And why was not an act of indemnity passed by the provincial legislature, and confirming all that had been done in the interim, excepting the acts of Andross, instead of that which merely declared that all laws of Massachusetts and of Plymouth should *remain and continue* in force for a limited period, if not repugnant to the laws of England or inconsistent with the constitution and settlement by the new charter?

The notion advanced by Hutchinson(*a*) is rather an inference of his from the publication of the new charter, than one admitted at the time. It was subsequently adopted by others, without due consideration. That the laws should cease to operate; that the bonds of society should be dissevered by the mere change of the form of government, was not the doctrine of 1775; and the course then pursued derived countenance and weight from the precedents under the colony charter and in the proceedings in 1692. Besides, if the laws had been annulled by the judgment on the quo warranto eight years before, we might inquire what laws were to *remain and continue* in force by the provincial act of 4 Wm. & Mary, ch. 1? Those enacted before its first or second repeal, or those since

(*a*) 2d Vol. 20 Mass. History.

the last? The reason of the thing proves that none were superseded but such as infringed the prerogative defined by the new charter. The true interpretation of the language, 'not repugnant to the laws of England,' such is, and undoubtedly was so received, as to confine it to matters of sovereign power or external, not internal police. For this same limitation was reincorporated in the patent by Wm. & Mary, and would have been infringed by every subsequent enactment differing from the laws of the realm, if it were not the true construction. The object of the clause was to preserve the allegiance to the crown, not subjection to the laws of the kingdom.

This mode of considering the question, it is apprehended, would remove the difficulty which seems to have labored in the minds of the judges, and led some of them to resolve into New England usages, what was distinctly enough to be traced by acknowledging the sanction of the colony laws. These did continue in force and in fact formed the basis of the subsequent judicial system.

In the second stage of the judicial history of the state, it would be supposed that a more formal mode of regulating the rights and duties of the freemen, would have been pursued than that which had before prevailed. In legislation it might have been so, but in other departments it was not.

The charter ordains that the governor, with the council or assistants, may do and perform all that is necessary for the probate of wills and granting administrations. They were constituted a court of ample jurisdiction and important powers; yet from that time, till 1760, no records of its doings were kept distinct from the executive proceedings. In that year the attention of the council was called to it by the governor.(*a*) He treats it as a matter of surprise that the nature of the court and the laws of practice which it ought to adopt, should have so long remained vague and indeterminate; that the court itself should be without a seal or even the common formalities of a judicial tribunal, when that court, and that only, was immediately constituted by the charter, antecedent to all provincial law. The subjects of its jurisdiction are then succinctly brought into view by him. Under the old charter they were cognizable in county courts as they were in England before the separation of the bishops' and sheriffs' courts in the reign

(*a*) Records of Supreme Court of Probate, 1st vol.

of William the Conqueror.(a) From the opinions then promulgated, some light is thrown on a doubtful point. In this message it is observed that it was a civil law court; and that the power of substitution or delegation is incidental to every civil law judge. No law of the province established the court of county judges of probate, though many recognised them as constitutional. Jurisdiction had been delegated to them by the governor and council; they were inferior civil law courts for distinct *peculiars*, from whom an appeal lay. But the state and relation of this supreme court and of these delegates, was novel. They were exempt from receiving prohibitions

(a) Appeals were allowed from these courts, to the court of assistants and general court. It is somewhat remarkable that in the cases of the wills of two of the earliest governors of the colony, appeals were taken, and the instruments purporting to be such, were disallowed; governor Endicott's in 1665, and governor Bellingham's in 1676. Hutchinson says of the latter person,—'he was bred a lawyer, but like some much greater lawyers, made his last will and testament in such a manner, that, after some years dispute, the general court thought it necessary to supply the defects of it by making a disposition of the estate themselves, (some controversies occasioned by it have lasted more than a century.)' This quotation is a strong instance of inaccuracy, and is the more remarkable in the author of the History of Massachusetts, as he had access to authentic documents and every opportunity for precision. Whether to indulge in a slur on a profession to which he himself was not bred, but aspired to its highest distinctions, or to screen the memory of two clergymen, who took advantage of the old age and weakness of the governor, to obtain bequests in trust for pious and charitable uses, to the disinheritance of his son; that he omitted any research on the subject, or suppressed what he knew, cannot now be distinctly affirmed. Certain it is that neither he nor Hubbard, who was on the stage at the time of Bellingham's death, allude in the slightest manner to the circumstances attending the execution of the will. After the provisional charter was received in 1706, a petition was presented to the general court to procure a reversal of the former judgment, but the council decided the question in the negative.

Contesting, possibly, the powers of the general court under the colony charter, on subjects of this nature, various suits were brought at law by the trustee and by his legal representatives—the last in 1759, of which, Hutchinson, from his station, must have had some knowledge; but they terminated adversely to those who sought to establish the will. From the evidence in the case, it appears that the mental powers of the governor had become nearly extinct, that it was believed he was incapable of understanding what he did. A quaint instance of aberration of mind is given from the narration of one of the subscribing witnesses:—The governor directed the witness to look in the closet for his spectacles, to enable him to write his name on the occasion; on his returning and telling the governor he could not find them, he bid him to seek them in prayer, and God would send them. The trustees immediately after the death of the governor executed a conveyance to the widow of a third of the property, which Major Winslow testified was done upon their acknowledgment that it was intended to have been given by the testator but omitted by mistake, and on his threatening to procure the will to be disallowed.

Thus it appears that it was the character of the parties and the conflicting testimony, which created the doubts of its validity, and not the mode in which the instrument was framed.

and mandamuses from common law courts, as in England. The provision made by the laws of the province respecting insolvent estates and other matters, and which empowers the judges of probate to execute them, were subjects of equity, and an appeal lying to the governor and council, it necessarily required them to act as a civil law court remedial, or a court of chancery.

The civil law, therefore, so far as it had been recognised as authority either in the ecclesiastical courts or courts of chancery, and established by law in England, was the law and rule of this court. It was the basis of the practice of the ecclesiastical courts in England, but was incorporated with some of the papal and other decretals, canons, and also with acts of parliament and resolutions of common law courts. Thus the rules and laws of this court were made known. Yet as to remedying the defects pointed out by the governor, little more was done than establishing a register, providing a seal, and fixing the times of holding it.(*a*)

Had the origin of this court been closely attended to, it would not, probably have been afterwards laid down as a general proposition, (which was unobjectionable under the particular circumstances,) that it possessed no more enlarged jurisdiction for the application of the principles of equity when exercising its appellate authority, than a court of law.(*b*)

It must have been admitted that possession of such power was necessarily incident to the subjects within its peculiar cognizance, and ought to be exercised for the attainment of justice, except in those cases where a different provision had been made by statute.

When it is considered that in a revolution of a few years, every man's estate is successively brought within the jurisdiction of a probate court, it must be held the imperative duty of the legislature to provide a code for the direction of that tribunal, simple in its elements and of easy comprehension. The

(*a*) By the St. 25 Hen. 8, c. 19, revived by 1 Eliz. c. 1, it was enacted that such laws ecclesiastical being then already made 'which be not hurtful or prejudicial to the prerogative nor repugnant to the laws and customs of the realm, should still be used and executed as they were before the making of that act,' until otherwise ordered by a commission of thirty-two persons therein provided. And Swinburne assigns as a reason for publishing his treatise on the civil and ecclesiastical laws, not 'repugnant to the laws and customs of the realm,' that no such order or compilation had then been made pursuant to the provisions of those acts.

(*b*) 15 Mass. Rep. 309. Eveleth Exr. *v.* Crouch et exr.

duty was felt, but the task was shrunk from in Massachusetts in 1816. Nor is it cause of surprise that the subject which affects every individual, should bring into the field a tribe of compilers to supply the neglect of the legislature. Thus probate directories, assistants, and vade-mecums have successively had their day, and given place to digests and abridgments of more ample promise, but not of more perfect execution. We regret that the work at the head of this article, which might have been rendered a safe guide, should be of the latter character. It commences with a brief historical notice of the probate jurisdiction, borrowed from a pamphlet published some time since on that subject, but without acknowledgment,(*a*) and proceeds to arrange the different statutes under the several heads indicated in the title page, and states the decisions of the courts of Massachusetts which are applicable to them. It partakes little of the character of a treatise which the author assumes for it in his preface. The compiler has, however, the merit of seldom hazarding an explanatory observation not derived from the author of the Commentaries on the laws of England or from the work of Toller; and when he does, its accuracy cannot be implicitly relied on. An instance in his second chapter, on the definition of wills, may be cited as an example. He says, page 14, 'a will or testament is the declaration of a party's intention which he directs *may be* performed after his death.' The use of the subjunctive mood would afford to executors an option with which few testators, we are inclined to believe, would be willing to indulge them. Neither Blackstone nor Toller, whom he cites, justify this definition. The former gives it from the Digest in these words, 'the legal declaration of a man's intentions *which he wills to be* performed after his death:' Toller: 'which he *directs to be* performed after his death.'

In the next sentence but one Mr. Blair observes that it will pass only such estate as the testator was *seized of at the time of his death*, and in the fourth section the observation is repeated.

The statute of wills requires the party to be seized at the time of making his will to give effect to the devise, and 10 Mass. Rep. 131, the authority referred to turned on the point of seizin at that period, and not at the death of the testator.

(*a*) A View of the Jurisdiction and Proceedings of the Courts of Probate, &c. Salem. 1822.

A rule of the ancient law which prevented the transfer of a *naked right*, gave countenance to the proposition that the statute of wills should be construed so as to prevent a devise taking effect where there had been a subsequent disseizin.(*a*) It seems strange that it should work a revocation; and the act of a wrong-doer compel a man to die intestate. No direct decision on the point is found in the reports of Massachusetts. And as it regards actual seizin, or seizin of wild lands, we do not hold the doctrine.(*b*) If the author meant that a subsequent alienation would amount to a revocation, he should have stated the proposition with that limitation, and indicated the modification which the rule had undergone with us. 5 Pick. 116. Again, at page 125, is found this observation, 'A guardian cannot by his own act bind the person or estate of his ward.'

The statute of 1794, c. 64, authorizes the guardian to bind *minors as apprentices, under the age* of fourteen years, in case of the death of the father; and after fourteen, having the minor's consent expressed in the deed. The guardian may make sale of the personal estate of his ward, except stocks or shares in corporations, which was prohibited, for the first time by the statute of 1817, c. 190, s. 35,(*c*) without license from the judge of probate. Careless remarks of this description, which by a slight attention might have been avoided, should not have been indulged in by one whose directory, as the preface informs us, 'was intended to be useful, as well as plain and intelligible.' Other errors might be pointed out; those of the press, by no means inconsiderable, we forbear to particularize, as they may be remedied if the work proceeds to a second edition. In such case, deficiencies should be supplied, and we would recommend for this purpose a thorough perusal of Swinburne, Godolphin, and Dr. Burn.

The distinction between the effect of a residuary clause on a devise of real and personal estate when lapsed, should be noted; and whether '*other relation*,' in the statute of 1783, c. 24, s. 68, is to be taken in the strict or popular sense. Something might be advantageously added under the title of nuncupative wills, particularly where the amount does not exceed fifty pounds; by what proof they are to be established, and what effect, if any, the statute has had upon that class of bequests.

(*a*) 11 Mod. 128, Brunker *v.* Cook.
(*b*) Dane's Abridg. c. 125, art. 6; c. 127, art. 4.
(*c*) See 1 Pick. 245, Ellis *v.* The Proprietors of Essex Merrimack Bridge.

Much might be gained on this head by a reference to the opinion of chancellor Kent, in the case of Prince *v.* Hazelton, in 20 Johns. Rep. 502; of rendering an account; and on the effect of a just account in discharging the principal or sureties in the probate bond, a discussion might be usefully had. The fee-bill provided for a *quietus;* whether such a discharge has fallen into disuse, and the cause of it, should be ascertained. Some of the decisions have apparently added nothing to the authority of *res judicatæ;* it appears that a technical waste is not purged by accounting for the article wasted, although the account may be allowed after due notice to all parties.(*a*)

If this work be destined for the profession, these and other topics should be enlarged on, and resort had to the civil law writers for illustrations, particularly in respect to the rules of descent as modified by the 118th novel of Justinian; if not, we should give a decided preference to the second work at the head of this article, for the 'lay gents.' That gives minute instructions for the performance of the office of administrator, executor, guardian, and trustee, at each successive stage of their duty. Local peculiarities are discernible in this work, nor is it free of error. We doubt the propriety of appraising *choses in action*, referred to at page 44; certainly such a practice in Massachusetts is growing out of use; these *rights* are usually entered on a list appended to the inventory. The object is to place in the registry a schedule of them with their amounts; and whether *sperate* or *desperate* cannot be known, till efforts have been made for their collection; it must be an idle ceremony for men to undertake to value on oath what is hardly the subject of valuation. The recommendation (in page 70,) to place at interest the money collected from time to time in the course of executing these trusts, and of seeing to the assignment of dower (page 218,) is not warranted by law, and may be productive of much inconvenience. Both of these works contain various forms which it will be unnecessary to examine. We notice the inaccuracy of the one relative to conveyances of real estate, in which personal covenants are introduced, in order to put the unwary on their guard. In the appendix of the former, page 239, is found a covenant against all persons claiming *as heirs;* and at page 196, of the latter,

(*a*) 16 Mass. Rep. 291, Dawes, judge, *v.* Winship. 5 Pick. Rep. 97, Brazier *v.* Clarke.

covenants against incumbrances, and for quiet enjoyment, which involve liabilities that ought never to be assumed in these trust capacities.

The value to the students of the law, of compilations of the kind we have been remarking on, depends altogether upon the completeness and accuracy with which they are formed. We are inclined to concur with Coke however, that they are 'most profitable to them that make them.' For general use the aid they furnish is doubtful. A treatise upon these subjects is much to be desired; and we despair of seeing one adapted to the institutions of New England and to the wants of the profession, unless the author of the 'View' we have already referred to, should resume his pen and fill up the outlines of the lucid sketch he gave to the public eight years since.

Art. IV.—ATHENIAN MARITIME LAWS.

[The following is the best account of the Greek laws on bottomry and respondentia, that has hitherto been published. It is from the translation published in London, 1828, of the Public Economy of Athens, published at Berlin by Augustus Boekh,(a) in 1817, and will be found equally interesting, both by the lawyer and classical scholar.]

A still higher profit [than the usual rate of interest] was obtained by capitalists, allowance being made for accidents, by sea-security (τοκος ναυτικος, εκδοσις) or bottomry, in which, according to the Grecian custom, the ship, the cargo, and the money received for passengers and freightage, were answerable for the principal. The loan appears to have been most frequently made upon the goods, (επι τοις φορτιοις, επι τοις χρημασιν, επι τη εμπορια) more rarely upon the vessel (επι τη νηι, επι τω πλοιω)

(a) The author is noticed in the Encyclopædia Americana under the name of Bökh, as one of the most distinguished philologists of the age, and his learning has not, like that of Parr, been sterile and of no utility beyond the personal acquaintance of its possessor, or after his decease. Professor Boekh is a public Greek lecturer and professor at the University of Berlin, and has published an admirable work on the odes of Pindar; and his Public Economy of Athens, from which the above extract is made, is the beginning of a new era in Attic antiquities. He is a genuine specimen of the indefatigable, never-sleeping German literati. In the most active period of his studious life, he sat with his feet in cold water, during the night, to prevent his falling asleep. His intense application has been injurious to him, his sight being now much im-

and the money received for passengers and freightage (ἐπὶ τῷ ναυλῳ)(*a*) In a case mentioned by Demosthenes(*b*) in which a trierarch borrowed money upon a ship that belonged to the state, and to the command of which he expected a successor, it is probable that the only security given was the ship's furniture, which was the private property of the trierarch. This species of interest, which was so odious at Rome, does not appear to have given offence in Greece, and at Athens, in particular, as being a commercial town; it was, however, exposed to much risk, as the loss of the security brought with it the loss of both the principal and interest; agreements of bottomry, in which the creditor did not undergo the risk, were prohibited by the laws of Rhodes, that is, nobody could take such high interest as was customary in bottomry, without exposing himself to the danger of the loss; but since by the Athenian law, every person could take as high interest as he could obtain, this restriction was not met with at Athens; and such contracts as the Rhodian law prohibited, have no connexion with agreements of bottomry, as there would, in those cases, be either

paired, though he still devotes many hours of the day to study, and retains his memory in all its vigor, insomuch that he makes all his numerous quotations and references, in the course of his lectures, without recurring to any written notes; and the accuracy of his references is considered so important, that each one is given twice by the lecturer, with great distinctness, that every pupil may note it correctly, and not be misled or at fault, in recurring to the authors cited, as it is the practice of the pupils to do after the lecture. While Mr. Niebuhr remained at Berlin, before his appointment as Prussian minister near the Papal Court at Rome, he and professor Buttman, (the author of the Greek Grammar, a translation of which has been used in some of our colleges,) Schleiermacher and professor Boekh, read together once or twice a week, some Greek author, each one making remarks and criticisms, and references, in relation to the passages read. In this way each revived and fixed in his memory his own reading, and at the same time possessed himself of the learning of the others. A richer treasure of Greek erudition has never, probably, been collected. Mr. Niebuhr has since remarked that he considered the hours spent at these meetings, those of the most rapid, easy, and satisfactory acquisition, of his whole life, and that all the seeds of Greek learning which had before been sown in his memory, were thus fertilized, and expanded into mature knowledge. The effect was no doubt the same in respect to the others. Professor Boekh made an address in Greek to the present emperor Nicholas, of Russia, at the time of his visiting Berlin.

(a) Concerning the expressions in use, see Schneider ad Xenoph. de Vectig. p. 180. An instance of money being borrowed upon freightage and the vessel, occurs in Demosthenes in Lacrit. p. 933, 22, and upon the freightage, as appears from Diphilus; and of money lent upon the vessel, Demosth. ib. and in Dyonysod. p. 1283, 18. What proof Hudtwalcker (*von den Diateten* p. 140) can bring in favor of his assertion, that at Athens, in cases of *foenus nauticum*, the ship was always pledged, I am unable to guess. The contrary is indeed evident from the passages quoted by Schneider and myself.

(b) In Polycl. p. 1212.

no security, or one which was not at sea.(*a*) Agreements of bottomry were rendered binding by means of an instrument styled a nautical contract, (ναυτικὴ συγγραφὴ)(*b*) which was deposited in the hands of a banker.(*c*) A document of this kind is preserved entire in the speech of Demosthenes against the Paragraphe of Lacritus, and part of another in the speech against Dionysodorus. The money was lent for a fixed time, and for a voyage to a particular place or country, and the debtor was bound to go to the place pointed out in the agreement, subject to a heavy punishment for the violation.(*d*) If it was only lent for the voyage outwards (στρεπλοῦς) the principal and interest were to be paid at the place of destination, either to the creditor himself, if he went the voyage, or to some other person commissioned to receive it; of this latter description was the cermacoluthus, who was frequently sent with the ship;(*e*) if the contract was for the voyage, both inwards and outwards, (ἀμφοτεροπλοῦς) the payment was made after the return. In these agreements there was generally a double security, the debtor being bound in goods to twice the amount of the loan, without being able to raise other money upon them;(*f*) and in agreements for voyages both inwards and outwards, if the goods given in security were sold, fresh commodities of equal value were to be reladen.(*g*) The severity of the laws against those who withdrew the security from a creditor, has already been remarked; but it was usual for a fine to be also fixed in the agreements, if the debtor should not surrender the whole security, or act otherwise contrary to the conditions, for example, of twice the amount of the principal, or of five thousand drachmas in a loan of two thousand.(*h*) Until the time of the repayment, the creditor was bound to leave the security untouched, if it was saved; and sometimes, for greater security, even the whole property of the debtor was made answerable by a particular stipulation.(*i*) The money of orphans could not, according to law, be vested in bottomry, although this regulation was often violated. As

(*a*) Concerning the meaning of the Rhodian law, which Salmasius had not perceived, see Hudtwalcker *de Foenore Nautico Romano*, p. 7.
(*b*) Demosth. in Lacrit. p. 932, 3. (*c*) Demosth. in Phorm. p. 908. 20.
(*d*) Demosth. in Dionysod. p. 1286.
(*e*) Demosth. in Phorm. p. 909, 24. p. 914, 28.
(*f*) Demosth. in Phorm. p. 908, et seq. in Lacrit. p. 925—928.
(*g*) Demosth. in Phorm. p. 909, 26.
(*h*) Demosth. in Dionysod. p. 1294, 12, in Phorm. p. 915, 1, p. 916, 27.
(*i*) Deed in the oration against Lacritus.

the hazard varied materially, according to the length of the time, the distance of the voyage, the danger to which the vessel was exposed from storms, rocks, hostile fleets, pirates, or licensed privateers, it is less easy to conceive that there should have been an usual rate of interest in Greece for bottomry, than for the mortgage of land; and the assertion of Salmasius,(*a*) that the rate of interest of the fifth part (twenty per cent.) was the most common at Athens, is entirely void of foundation. The interest upon the money lent only for the voyage outwards, must moreover have been less than that for the two voyages inwards and outwards, particularly since passengers, who accompanied the master of the vessel, carrying at the same time sums of money with them, would naturally be more ready to lend it to the captain, as they must have still incurred nearly the same risk that arose from bottomry, if they took it with them without interest. The ten or twelve per cent. interest upon money lent in bottomry mentioned by Diphilus,(*b*) must undoubtedly be understood only of the passage outwards; as also the interest of the eighth part (twelve and a half per cent.) in Demosthenes,(*c*) which the trierarch Apollodorus lent to the ship-captain Nicippus, for the passage from Sestos to Athens, but upon the condition that the trireme should first go to Hierum to convey vessels laden with corn, and that the principal and interest should be paid at Athens, in case the ship returned safely to port. The amount of this interest of the eighth part, Harpocration correctly estimates at three oboli to the tetradrachm. Higher interest in loans upon bottomry frequently occurs. Xenophon, in his treatise upon the revenues,(*d*) proposes to erect public buildings for the convenience of merchants, as a means of procuring a profitable return to the citizens, and he supposes that the necessary sum could be collected by contributions of different magnitude, but that each subscriber would get a return of three oboli daily; he then proceeds to remark, that those who put in ten minas, would receive nearly the interest of a fifth part, the rate which was commonly given in bottomry, (ναυτικον τοκον επιπεμπτον) and those who put in five minas, more than the interest of the

(*a*) De M. U. T. p. 10. Vide p. 209, where his reference to Xenophon proves nothing.

(*b*) In the passage which Salmasius quotes, p. 35:

ως δ' επι τη μνα γιγνεται και δωδεκα
λαβων τα πεντε και δεκα τις εγγυαται.

(*c*) Demosth. in Polycl. p. 1211. (*d*) 3. 7—14.

third part; that the greater number, who subscribed a less sum, would obtain an annual income of more than the capital which they contributed; for example, for one mina, nearly two. The interest of the fifth and third parts are evidently here considered as common in cases of bottomry. The danger connected with this method of loaning money, is alluded to by Xenophon, when he states it to be an advantage to be expected from his proposals, 'that the profit would arise in the state itself, which appears to be the most secure and lasting revenue.' It is also manifest that the interest of the fifth part is here precisely twenty per cent. and of the third part thirty-three and a third per cent. which latter Harpocration correctly fixes at eight oboli for the tetradrachm, and that the former ought not to be confounded with the interest of nine oboli, nor the latter with that at three drachmas (eighteen and thirty-six per cent.) For the year, being reckoned at three hundred and sixty days, three oboli a day give an annual income of one hundred and eighty drachmas, which, for ten minas, are eighteen, and for five minas, are thirty-six per cent.; the former the author calls nearly the interest of the fifth part, the latter more than that of the third part. Other statements of the rate of interest likewise occur in Demosthenes. Phormion had lent twenty minas for a voyage inwards and outwards to Pontus, at an interest of six minas, that is, at thirty per cent.(*a*) In the carelessly written instrument in the speech against Lacritus, three thousand drachmas are lent upon Mendæan wine, for a voyage from Athens to Mende or Scione, and from thence to the Bosporus, the borrower being at liberty, if he prefers it, to sail on to the left along the coast of the Black Sea as far as the Borysthenes, at the rate of two hundred and twenty-five for one thousand drachmas for the whole time of absence. In this, however, it is supposed that the borrowers, Phaselitans by birth, are to commence their voyage back from the Pontus before the early rising of Arcturus, in the month Boedromion, about the 20th of September, as the autumn, (φθινοπωρου) and with it the dangers of navigation then commenced;(*b*) instead of the interest of twenty-two and a half per cent. the higher

(*a*) Demosth. in Phorm. p. 914, 6.

(*b*) This stipulation is like that in some of our policies of insurance on West India voyages, which make it a condition that the vessel shall sail before a certain day, for the purpose of not being exposed to the increased risk of navigating the West India seas during the hurricane months. Ed. Am. Jurist.

rate of thirty per cent. or three hundred for a thousand was however to be paid, if the voyage back from Pontus to Hierum upon the mouth of the Bosporus, should be undertaken, as it sometimes was, after the rising of Arcturus.(*a*) Since the agreement extends to different places, and liberty is allowed to the borrower to sail into the Pontus or not, as he prefers, there is, at the end, a further limitation added, in the event of the vessel not running into the Pontus; for in that case, in order to avoid the tempests of the dog-days, the vessel was to remain in the Hellespont, at the end of July, ten days from the early rising of the dog-star, (ἐπὶ κυνὶ) with which the latter part of summer (ὀπώρα) begins, for the purpose of unlading their cargo in a secure place, and then to return to Athens, where they have to pay the interest fixed in the preceding year. The addition of the words 'in the preceding year,' is superfluous, but correct; the instrument was signed early in the year, at the time when the navigation commenced; now the year ended and begun about the middle of summer, about the time of the summer solstice, and consequently the early rising of the dog-star fell in the following year. In this last mentioned stipulation, the lower rate of interest is meant; for the higher rate was only to be paid if the return from the Pontus took place after the rising of Arcturus, and thus if the ship did not run into the Pontus, it did not apply at all. On the other hand a new risk might in this case arise, which would not exist if the vessel entered the Pontus; the borrowers might return from the Hellespont during the storms of the dog-days, which, in case of a voyage in the Pontus, could not have taken place on account of the greater distance; it is therefore fixed, that in the former case the vessel should remain in the Hellespont. With regard to the security of the place in which the goods should be disembarked, it is stipulated that no part of the cargo should be discharged at any port where the Athenians had the right of reprisal; (ἐκτὸν ἂν μὴ σύλαι ὦσιν Ἀθηναίοις) one should rather have expected this condition to have been made with respect to places where this right had been granted against Athenians; (κατ' Ἀθηναίων) for the creditors, of whom one is an Athenian, could not be afraid of the Athenians;

(*a*) See Demosth. in Polycl. p. 1212, 14—24. The situation of Hierum is in Bythinia, close to the Thracian Bosporus. See Harpocration and Suidas, in v. ἐφ' Ἱερῷ and passages referred to by Wolf ad Leptin. p. 259. It was an emporium where masters of vessels returning from the Pontus, put in.

neither could the borrowers, since they traded at Athens, have had any thing to apprehend from the Athenians. This difficulty is, however, easily removed; for (not to mention that the trierarchs, at this precise period, made reprisals upon the property of persons, whom the state had given them no authority to plunder, and consequently that both Athenian and Phaselitan property might easily have been captured by them, it is evident that the moment any property passed either from or to any place, against which the Athenians had given permission to make reprisals, it became necessary to prohibit, by a clause in the agreement, the unlading of the goods at any such place, as Athenian property, and consequently the security on which the money was lent, would then be seized as an act of retaliation, by those whom the Athenians had plundered. It is to be remarked that their commercial agreements were in general made only from the time of a ship's voyage from the spring, till late in the year, and sometimes for a still shorter time, in case of a voyage that might be soon ended; a time was commonly appointed for payment, after the return of the vessel, as for example, in the agreement in the speech against Lacritus, the principal and interest were to be paid within twenty days after the vessel returned to Athens, with the exception of what might be thrown overboard by the common consent of all in the ship,*(a)* or be taken away by the enemy. But the interest in bottomry was often for a longer period. Thus, according to the statement of Demosthenes, an individual borrowed a sum of money in the month Metageitnion, in the middle of summer, and was only bound to pay it in the same year, that is, before the beginning of the next summer.*(b)* In this case a proportionally higher rate of interest was doubtless given; as it was higher on account of the greater length of the voyage.*(c)* In most cases, however, the creditor withdrew his capital in the winter for his own use.

(a) We here meet with an allusion to the rule which forms a part of all the codes of sea laws, that jettisons should be made only after a consultation with the crew. This rule had a better foundation, when, as in modern Greece and formerly in European vessels very generally, the sailors were all partners in the voyage Since they have ceased to be such partners the rule has fallen into disuse. Ed. Am. Jurist.

(b) Demoth. in Dionysod. p. 1283, 19. p. 1284, 10.

(c) Ib. p. 1286.

ART. V.—THE LIMITATION OF REAL ACTIONS IN TENNESSEE.

IT could never have entered into the minds of an English judge to decide, that the statute of 21 Jac. I. c. 16, s. 1, was intended to create a bar against any remedy for the recovery of the right of property. The words of the statute, in themselves alone, exclude such an idea. 'No person,' says the statute, 'shall make any *entry* into any lands, &c. but within twenty years next after his right or title first descended or accrued, and in default thereof, such person so *not entering*, and his heirs, shall be utterly disabled from such entry.'

As this statute operates by way of bar to the remedy,(*a*) so it bars such remedies only as require, for their successful assertion, an entry upon the land. Now an ejectment is a possessory action, wherein the title to lands and tenements may be tried, and the possession recovered, in all cases where the party claiming title has a right of entry.(*b*) It follows, that to maintain the action of ejectment, the party at whose suit it is brought must have been in possession, or at least clothed with the right of possession, and of course with the right of entry, at the time of the actual or supposed ouster. But, by this statute, no person shall make entry into any lands but within twenty years, &c. and as the right of entry is taken away, so the remedies provided by law for enforcing that right, and which are simply incident to that right, are likewise taken away.

Such is the obvious import of the language itself of this law. But when viewed with reference to the system of which it is a part, no one could suppose it was intended to operate so as to toll any remedy for the right of property. For the statute of 32 Hen. 8. c. 2, which is in *pari materia*, and constitutes the remainder of the system which has been mentioned, fixes the limitation of time in a writ of right at three score years next before the *teste* of the writ.(*c*) The statute of James operates upon possession and possessory remedies, the statute of Henry upon rights and writs of right.(*d*) After the passing of the act of 32 Hen. 8, and before that of 21 Jac. I., although

(*a*) Sugd. Vend. 266. (*b*) Selw. N. P. 721. (*c*) 1 Inst. 115 a.
(*d*) Bac. Ab. Limit. B.

a man had been out of possession of land for sixty years, yet if his entry was not tolled by descent, by discontinuance, or fine and non-claim, he might enter and bring an action on his own possession. The statute of James altered the rule in this respect, by superadding to those of the common law, a statutory mode of tolling an entry, namely by neglecting to enter for twenty years after the title or right descended or accrued, by which no person can now *enter* except within twenty years after his title accrues.(*a*)

If it should appear that the legislature of North Carolina had re-enacted both of these English statutes, we should very naturally conclude, that it was intended to maintain the distinction of those statutes between possessory and droitural actions. No English statute was in force in North Carolina passed after the fourth year of James I., in which year the charter to the colony of Virginia was granted, which included the territory afterwards called North Carolina.(*b*) It was for this reason, and the intrinsic necessity of the law, that the legislature in 1715 passed an act of limitations, c. 27, the third section of which is concluded almost in the very words of the first section of the statute of Jac. I. c. 16.(*c*) The statute of 32 Hen. 8. c. 2, was no doubt considered to be in force, and hence it was judged unnecessary to re-enact it in terms. Yet the legislature of 1715, in order to place the question, what laws of England were in force in the colony, beyond dispute, declared, c. 31, that 'all laws providing for the privileges of the people, and security of trade, as also, all statute laws made for the limitation of actions, and preventing of vexatious law suits, and for preventing of immorality and fraud, and for confirming of inheritances, and titles to land, are and shall be in force here, although this province, or the plantations in general are not therein named.'(*d*)

By this act the statute of Henry above mentioned is as clearly made the law of North Carolina as English words can do it, unless it were re-enacted by name. There is but one way of avoiding this consequence, and that is to say, that the legislature intended to repeal the statute of 32 Hen. 8. c. 2, by substituting in its stead their own act of 1715, c. 27. This however, was never pretended prior to 1793. Supposing therefore, both of these English statutes to have been in force

(*a*) 4 Co. 11, b. Sug. Vend. 270. (*b*) 1 Ten. R. 154. (*c*) 1 Scott, 14. (*d*) 1 Scott, 22.

in North Carolina, the one by special, the other by general re-enaction, what doctrine would we suppose *a priori*, to have prevailed in the courts of that state, as to the operation of their statute of 1715, c. 27, s. 3? The same, undoubtedly, that had prevailed in the English courts as to that of 21 Jac. I. Because the same reasons precisely, drawn both from the language of the act, and from its connexion with other laws operated in the former as in the latter case.

Accordingly we find it stated by one who was every way competent to determine,*(a)* that 'before the year 1793, and up to that period, the act of 1715, c. 27, received the same construction as did the statute of James the first, by the judges in England. Possession for seven years, barred the right of possession, which had been in the plaintiff, vested the same in the possessor, and barred the claim of ejectment founded on the right possession in the plaintiff. It left the right of property in the plaintiff, and an action founded on that right of property.' The possession here meant is a naked or mere possession, or such possession as a disseizor obtains. A disseizor who enters upon the land of another by force, and turns him out of possession, has mere possession; should the owner acquiesce for twenty years, the owner would lose his right of entry, and his remedy by ejectment, although his right of possession and of property would still reside in him; but after a lapse of thirty years the right of possession would vest in the original disseizor, and the owner would retain the mere right of property; and after an acquiescence of sixty years, the right of property in the former owner would wholly fail.*(b)* Such likewise, was the construction of the courts of North Carolina, upon their own act of 1715, c. 27.

About 1793, or soon afterwards, the design was conceived, of rendering this act a perpetual bar, not only to the action of ejectment founded on the right of possession, but also to all actions founded on the right of property, and to vest an absolute fee in the possessor.*(c)* It would seem that nothing less than legislative interference could effect this great change. Such in fact is actually the case; but in this instance, a power of a legislative character was used, not by the body in which the constitution has vested it, but by the judicial department.

(a) Judge Haywood, Peck's R. 218. *(b)* Stark. Ev. Pt. iv. 1191, note *g*. Harg. Co. Lit. 239 a, n. 1; 325 a, n. 1.
(c) Peck's R. 218.

We are told, however, that the power of construing a statute is in the judges; who have authority over all laws, and more especially over statutes, to mould them according to reason and convenience, to the best and truest use.(*a*) But we are told, on the other hand, that by the rules which are laid down in England for the construction of statutes, and the latitude which has been indulged in their application, the British judges have assumed a legislative power; and on the pretence of judicial exposition, have in fact made a great portion of the statute law of the kingdom.

Our own judicial history will not be without its examples of judicial exposition which amount to actual legislation; and if the modification of the third section of the act of 1715, so as to make it bar droitural as well as possessory actions, be not one of them, perhaps every instance of strained judicial construction to be found in the English books, may claim an exemption from the severe imputation of usurpation of legislative power.

But at the late period of 1793, in the face of a contrary construction for one hundred and sixty-nine years in England, and for seventy-eight years in North Carolina; contrary to the unambiguous language of the act itself, and in direct opposition to a statute fixing the limitation of droitural actions to sixty years, how was the court, admitting that reason and convenience justified it, to mould a statute providing a bar of possessory actions only, so as to bar droitural ones, and to pronounce that this new application was its best and truest use? Were men to be told that a disseizor should, by his wrong, in the short space of seven years, ripen his naked possession not only into a right of possession, but also into a right of property, and that the former owner should be totally divested of title? Were they to be told this, when the legislature had said that a mere possession should not become rightful till the lapse of twenty years, and that this right of possession, gained by lapse of time, should not be clothed with the right of property till the expiration of sixty years? This indeed would have been an exertion of judicial power without a parallel in the annals of jurisprudence. Yet it *was* exerted; and its exertion produced the unexampled effect of repealing one statute, which, beyond all reasonable doubt, was in force, and of applying another to a

(*a*) Bac. Ab. Statutes H.

use for which it was never designed, if the slightest reliance is to be placed on a uniform practice of seventy-eight years.

Nevertheless all this was effected, in a way that manifested no small insight into human character. The first step was, to palliate the rule, which it was intended should be established—to gild the pill that was to be administered. The possessor was to be clothed with *color of title*, and it was this subtle entity of imagination, to which was to be annexed the right of possession, and the right of property, to the total exclusion of the first grantor. The legislature intended, it was said, by the act of 1715, to supply the place of the statutes of Henry and James, and to make seven years possession a perpetual bar. But this bar was not to be operated in behalf of a naked trespasser known to himself to be so, but in behalf of one, who, having *color of title*, took possession of the land, believing himself to be the real owner.

As this doctrine was confessedly an innovation, and, if it should prevail, would be the foundation of a system, in every particular, opposite to that which had hitherto obtained, it was, of course, incumbent on its advocates to point out the expressions of the act of 1715, that authorized their construction. It will be impossible, it is apprehended, to understand this controversy clearly, without reference to the statute out of which it arose. As its provisions are short they are accordingly introduced.

Sec. 2. All possessions of, or titles to, any lands, &c. derived from any sales made either by creditors, executors, or administrators, or by husbands and their wives, or husbands in right of their wives,(*a*) or by endorsements of patents, or otherwise, of which the purchaser or possessor, or any claiming under them, have continued, or shall continue in possession seven years, without any suit in law, be, and are hereby ratified, confirmed, and declared good and legal, to all intents and purposes against all and all manner of persons.

Sec. 3. No person nor their heirs which shall hereafter

(*a*) Littleton tells us, sec. 594, 'if a man be seized of land as in right of his wife and thereof infeoff another, and dieth, the wife may not enter, but is put to her action which is called *cui in vita*.' 'But this,' says Lord Coke, 'is altered since our author wrote, by the St. of 32 Hen. 8, c. 28, by the purview of which statute, the wife and her heirs after the decease of her husband may enter into the lands or tenements of the wife, notwithstanding the alienation of her husband.' This section of the act of 1715 therefore, it would seem, modified and restored the rule of the ancient common law, repealed by the statute of Henry.

have any right or title to any lands, &c. shall thereunto enter or make claim, but within seven years next after his right or title descended or accrued, and such person so not entering shall be utterly excluded and disabled from any entry or claim thereafter to be made.

Sec. 4. This section makes a saving in favor of infants, femes covert, persons *non compos mentis*, imprisoned and beyond seas, and then follows this clause: 'But all possessions held without suing such claim as aforesaid, shall be a perpetual bar against all and all manner of persons, that the expectation of heirs may not in a short time, leave much land unpossessed, and titles so perplexed, that no man will know of whom to take or buy land.'

But the act was preceded by a preamble, which must not be neglected, since the new sect employed it as the key to unlock the treasures which were to be expended in erecting their system. This preamble, then, alleges that 'great suit, debate, and controversy hath heretofore been, and may hereafter arise, by means of ancient titles to land derived from patents granted by the governor of Virginia, the conditions of which patents have not been performed, nor quit rents paid, or the lands have been deserted by the first patentee, or, for, or by reason or means of former entries or patents granted in this government, for prevention whereof, and for quieting men's estates, and for avoiding suits in law,' it professes that the above provisions were made.

The perpetuity of the bar was countenanced, it was said, by the words in the last clause of the fourth section,(*a*) and by the concluding expressions of the third section. The possession spoken of in these clauses shall '*utterly exclude and disable*' the party out of possession from any entry or claim thereafter to be made, '*shall be a perpetual bar to all and all manner of persons.*' Not only the claim and entry, they said, but all persons shall be barred. Since, then, the bar formed by these clauses is a perpetual bar against all *claims*, all *entries*, all *persons*, and all *suits*, it takes from the plaintiff all remedy, and consequently all title and right, and vests in the defendant necessarily, the absolute dominion forever, and renders his title perpetually indefeasible.(*b*)

Hence we perceive that the English construction of the

(*a*) Peck's R. 218. (*b*) 2 Hayw. 94.

statute 21 Jac. I., and the corresponding construction of the act of 1715 by the courts of North Carolina, are overturned from the very foundation. For according to those constructions, as we have seen, mere possession for the time of limitation, would bar the plaintiff's entry, and vest the possessor successively with the right of possession and the right of property. But no length of mere possession, according to the doctrine of this new sect, would avail the possessor any thing, who knew he was a trespasser when he took possession. But if he took possession under an imperfect conveyance from a person having a good title, or under a conveyance in legal form, from the only apparent and reputed owner, and held such possession peaceably for seven years, he acquired an absolute estate in fee in exclusion of the former owner.(a)

The state grants land to A, and another person by the name of A takes possession on the pretence that he is the grantee. No length of possession would vest him with title, because he settled without *color of title*, knowing himself to be a trespasser. But if he sell to B, who holds seven years, B would acquire thereby an indefeasible title against the true A; because he holds under a conveyance good in form, from the only reputed owner. Thus the operation of the statute to bar the right of property, and vest title in the possessor, is made to depend on the contingency of the possessor's knowledge of the true ownership. In this case, if we suppose the spurious A to be, by any means, possessed of the grant, the purchaser might be completely imposed upon, and it would not be possible, by any reasonable diligence for him to detect the fraud. In a contest between the real and pretended A, the former would be compelled to evince his identity. But, let us suppose the pretender to die possessed of the land, leaving the grant among his papers, and his heirs to retain possession after his death seven years. They might or might not be acquainted with the true state of their ancestor's title. If they were, their possession and that of their ancestor would avail them nothing; but if they were not, the statute would clothe them with the exclusive title, because theirs was a possession with *color of title*. Here then is a new species of descent which will toll an entry, nay more, it takes away the property itself. To say the least of it, the rule of the English law is more simple and unembarrassed, if not better adapted to the condition of things in this country.

(a) Peck's R. 408.

It is not to be supposed that this doctrine was quietly acquiesced in. On the contrary, it was vigorously opposed in North Carolina from 1793, when it was first advanced, till 1804, when the court of conference, then the highest tribunal(*a*) in the state, in the case of Stanley *v.* Turner,(*b*) settled it, by deciding, that a possession of lands for seven years, must be *adverse*, and accompanied with *color of title*, to create a bar under the act of 1715, c. 27. The bar intended in this decision, is, of course, not such as operates upon possessory actions, but upon droitural ones. It will very much elucidate this part of the subject, to give a succinct account of the principal cases in which this doctrine of *color of title*, was agitated in North Carolina between 1793 and 1804, whence we shall clearly see the successive steps by which it was finally established.

In the case of Young *v.* Irwin, decided in Nov. 1797,(*c*) the defendant took possession of the land under a contract to convey, when he should pay the purchase money. He continued this possession upwards of forty-three years, when, after devising the land to his sons the defendants, and charging his personalty with the payment of the debt for it, he died without having paid the purchase money. In the mean time, his vendor, under a decree of the court of chancery, conveyed to another, and a vendee of this purchaser brought the action. The counsel for Irwin insisted that here was adverse possession for seven years, which, without color of title, would take away the plaintiff's right of entry; but if color of title were necessary to accompany the possession, in order to form a right of possession in the defendant and create a bar, here was the will of the ancestor, and possession made it from 1757 to 1797. The court consisting of Haywood, judge, only, determined, as to the first point, that Irwin's possession was the possession of his vendor, and consequently was not *adverse*, without which the statute would not operate at all; and, as to the second point, that the will was not a *color of title* in the devisor, because it took notice that the title was in the vendor, and provided for obtaining it by payment of the purchase money. The statute, continued the judge, who indeed was the great champion of this doctrine, did not operate in favor of one who settled on the land of an individual proprietor,

(*a*) Peck's R. 219. (*b*) 2 Hayw. 336. (*c*) 2 Hayw. 9.

knowing he was a trespasser in so doing, which he must know, if he had no *color of title.*

The next case was Grant *v.* Winborn,(*a*) decided in April, 1798, in which there was a grant of the land in 1725 to one Skipper, from whom the defendant claimed, and to the father of the plaintiff in 1762. It was admitted that the former patentee once had title to the land; but it was contended that there had been such a possession in the latter patentee and those claiming under him, as destroyed that title and acquired one for the lessor of the plaintiff. The reporter gives no intimation what the circumstances of that possession were, but the court, consisting of Haywood and Stone, justices, are represented to have given the following disquisition upon the statute of 1715: As to the nature of the possession that is calculated to destroy the title of a former patentee, it is to be collected from a recurrence to the circumstances of this country at the time of passing the act of limitations. The act was passed in 1715, when the country was thinly inhabited, and it was the policy of the legislature to encourage its population. In many instances the same land was covered by two or more grants; and frequently when a later patentee or those claiming under him, had settled on the land comprised in his grant, and had cleared and improved it, he was turned out of possession by the exhibition of a prior grant. This tended to discourage the making of settlements, and of course, to repress population. The legislature therefore provided the act of limitations to obviate these mischiefs; and it was the *intent* of this act, that where a man settled upon, and improved lands upon supposition that they were his own, and continued in the possession for seven years, he should not be subject to be turned out of possession. Hence arises the necessity of *color of title*, for if he has no pretence of title, he cannot suppose the lands are his own, and he settles upon them in his own wrong. The law has fixed the term of seven years, both for the benefit of the prior patentee, and the settler, that the latter might not be disturbed after that time; and that in that time, the prior patentee might obtain notice of the adverse claim and assert his own right. Hence arises the necessity that the possession should be notorious and public. In order to make it so, the adverse claimant should either possess it in person, or

(*a*) 2 Hayw. 56

by his slaves, servants, and tenants. From this view of the subject arises the following definition of possession, which is calculated to give title: *A possession under* color of title, *taken by a man himself, his servants, slaves, or tenants, and by him or them continued without interruption for seven years together.* The court here endeavors to show, from the *circumstances* of the country, that it was the *intention* of the legislature to make the act of 1715 a perpetual bar to the *right* as well as the *entry.* But if so, this very difficult question presents itself,—how comes it that the act of 1715 received a different contemporaneous exposition, and that this exposition was never controverted or denied to be the true one till 1793? Can the courts of the period when the act was passed be supposed to have been more ignorant of the *intention* of the legislature as inferrible from the then circumstances of the country, than the courts were more than three-fourths of a century later? Or did the courts of 1793 deduce the intention of the legislature of 1715 from the circumstances of the former rather than from those of the latter period?

In the case of Armour *v.* White,(*a*) which occurred in October 1798, part of the land in dispute had been in possession of the defendant for forty years and more, but there was no deed from the ancestor of Armour (under whom the defendant claimed,) which included it, nor was there a deed from any other person that did. The court consisting of Haywood, justice, alone, said that the act of limitations could never ripen such a possession into title. The act gives that effect to possessions which are taken and kept with a reasonable ground of belief that the lands so possessed do belong to the possessor, as by some deed or the like from some person having a pretended title.

At April term, 1799, Moore and Haywood being judges, the case of Armour *v.* White,(*b*) perhaps a branch of the last case, came on. The lands in dispute were one hundred acres, part of a tract granted by an old patent to one Stanton, who conveyed the said one hundred acres to William Armour, who had a son, Theophilus, who had a son, William, the lessor of the plaintiff, and who left the country in 1768, and never made claim after going away till just before the commencement of the action. Stanton in 1714, assigned the land comprised

(*a*) 2 Hayw. 69. (*b*) 2 Hayw. 87.

in a certain plat to Guthrie in order that he might obtain a patent for the same, and in 1716, a grant issued to Guthrie for one hundred and ten acres, the lines of which grant included a part of the one hundred acres previously sold to Armour. Under the grant to Guthrie, the defendants claimed the whole of the one hundred acres sold to Armour, and they and those under whom they claimed had possessed a part of the one hundred and ten acres in Guthrie's patent upwards of forty years. They also proved by old deeds for lands adjoining that part of Armour's one hundred acres not included in Guthrie's patent, that the lines of Armour's tract on that side, were reputed the lines of those under whom they claimed. Moore said, 'the possession of part of a tract, circumscribed by marked lines, is a possession of the whole tract within these lines. If the defendants possessed the part mentioned in the evidence, claiming under Guthrie's patent, their possession extends to the lines of that patent and no further; but if they possessed this part claiming as far as the lines of the one hundred acre tract, then their possession extends to the whole tract.' This would have been sufficient in point of law to determine the case one way or the other, but not content with enough, the judge adds, 'A naked possession for seven years, without entry or claim, will bar the right of entry of all adverse claimants: and a possession with color of title for seven years, will give the defendant in possession, an absolute right against all others forever.' The first of these propositions was founded on the third section of the statute, being the construction which had prevailed, as we have seen, from the passing of the act to 1793. The latter proposition was based upon the second section, possession under one of the defective conveyances mentioned in which, being what Moore understood by possession with *color of title.* Should this construction prevail, the whole fabric of the perpetual bar, which some lawyers and judges had been erecting, with infinite pains, upon the construction of the third section, must tumble in ruins about their ears. For though Moore expressly said seven years possession with color of title would bar the right of property, yet it was color of title derived from a certain class of conveyances and confined to them alone. Now this class of conveyances had been designated by the legislature, and beyond their action it would not be competent to go, since the mention of some conveyances must necessarily exclude others not mentioned. But these cases were limited

in number, and their recurrence had been provided against by two acts of the same legislature of 1715, the one prescribing a mode for *femes covert* to pass lands, the other, directing the mode to be observed in conveying lands, and were not therefore likely often to arise. It was not color of title, therefore, arising out of the defective conveyances mentioned in the second section, which the new sect advocated, but color of title arising out of what they said was the true construction of the third section, in passing which they insisted, as we have seen, it was the *intent* of the legislature that when a man settled upon, and improved lands, upon supposition that they were his own, and continued in possession seven years, he should not be subject to be turned out of possession. To sustain this construction, therefore, Judge Haywood, the reporter of Armour *v.* White, appends a long note to it, in which, with abundance of ingenuity, he combats the distinction, taken by his brother Moore, between a naked possession and a possession clothed with color of title, and endeavors, by intrinsic and extrinsic arguments, to show that the intention of the legislature in passing the act of 1715 was to create a perpetual bar by the third section.

The distinction taken by Moore again appears, however, in the case of Bloss *v.* ——,(*a*) decided in October, 1802. Judge Johnston said, seven years possession *without* colour of title will bar the plaintiff's right to an ejectment. The reporter adds in a note,—'*Quære* as to seven years naked possession being a bar to the plaintiff; for it is not law, as the court of conference has since decided, where he alludes to the case of Stanley *v.* Turner, to which we have already referred. That case in fact settled the controversy, and established the doctrine that the legislature did intend by the third section to bar droitural actions, but in order to this, that the seven years' possession there spoken of, should not be a naked one, but clothed with color of title. And thus by one of those judicial subtilties, or acts of legislation, which invented means to adapt the *ejectio firmæ* to the trying of titles, and found it possible to bar an entail in the face of the statute *de donis*, was an act, passed, beyond all reasonable doubt, to limit possessory actions, *moulded to its best and truest use*, the limitation of droitural ones, and a statute which opposed an obstacle, apparently insuperable by judicial means, namely, the 32 of Hen. 8, c. 2, re-enacted by the legislature, virtually repealed.

(*a*) 2 Hayw. 223.

When in 1797, the controversy was at its zenith in North Carolina, the legislature of Tennessee passed their act of that year, (c. 43, s. 4.) in which they adopted the doctrine of the advocates of color of title. From the preamble to this act it appears it was enacted to remove doubts which had arisen with respect to the true construction of the existing laws respecting seven years peaceable possession. With this laudable end in view, it is enacted, that in all cases where any person shall have had seven years peaceable possession of any land, by virtue of a grant, or deed of conveyance founded upon a grant, and no legal claim by suit, in law, by such set up to said land, within the above said term, then the person so holding possession shall be entitled to hold possession in preference to all other claimants, such quantity of land as shall be specified in his said grant, or deed of conveyance founded upon a grant, and any person who shall neglect for the said term of seven years from the time of such peaceable possession having been obtained, to avail himself of any title or legal claim which he has to any lands, shall be forever barred.

No sooner was this act passed, than a more flagrant controversy arose as to its construction than that, to remove which it had been passed. The advocates and opponents of color of title now ranged themselves on the opposite sides of this dispute. The latter held that as the legislature had described the possession which was calculated to operate a perpetual bar, to be 'a peaceable possession by virtue of a grant or deed of conveyance founded upon a grant,' so a party must be able to *connect* himself with a grantee by an uninterrupted chain of mesne conveyances. If a link in his title were wanting, his possession, how long soever continued, would not be sanctified by the lapse of time. On the contrary their adversaries held, that no connexion between the possessor and the grantee was necessary, but if he had had seven years peaceable possession of *granted land*, by virtue of an informal deed from the true owner, or by virtue of a formal deed from the only reputed owner, his possession would be ripened into an exclusive title. The former doctrine is founded on the words of the act of assembly, '*by virtue of a grant or deed of conveyance founded upon a grant.*' The latter, it is evident, is the doctrine of color of title applied to the construction of the act of 1797. A talisman of such powerful efficacy was not to be lightly cast away, and we shall soon see it again exerting its wonted energies.

In the case of Hampton's lessee *v.* M'Ginnis,(*a*) decided in September, 1808, the facts did not, strictly speaking, present a chasm in the defendant's bill, but it was nevertheless agreed on both sides, as though they did. His counsel insisted that he had been in possession seven years, with color of title, and the plaintiff's, that the defendant could not avail himself of his possession, because he could not show a regular chain of conveyances from the grantee to himself. The court consisted of Overton, Campbell, and Powell. On the charge to the jury, Powell gave no opinion, Campbell was inclined to think with the plaintiff's counsel, but Overton argued strenuously against the necessity of connexion. There was a verdict for the defendant. On an application for a new trial, Powell still gave no opinion; Campbell thought the equity of the case was with the defendant, and therefore would let the verdict stand, 'but since the former argument he was inclined to think the statute did apply,' that is, he now thought with the defendant's counsel; and Overton remarked with some severity upon his brother Campbell's principle of not disturbing a verdict because the equity of the case was with one or the other of the parties, as totally unknown in ejectment cases. This case evidently did nothing towards settling the question whether connexion was necessary or not, because there is no decisive opinion of the court, and because the question did not necessarily arise out of the facts of the case.

The next case in which the doctrine was adverted to, was Craddock's lessee *v.* Staleufe,(*b*) in November, 1808. This case was decided on totally different principles, but as seven years possession had been insisted on in the argument for the plaintiff, the court remarked,—'In the case of Hampton's lessee *v.* M'Ginnis, it is understood the court were of opinion that it was not necessary for the defendant to deraign a connected title to himself from the original grantee; the statute might be available without it.' It is impossible to learn this from the report of that case.

Then came the case of Napier's lessee *v.* Simpson,(*c*) in June, 1809. The defendant claimed from a younger grantee by deed, dated August 15, 1799. He was in possession in March, 1799, having then made the purchase, but not obtained the deed. The writ issued April 2, 1806. It was insisted

(*a*) 1. Tenn. R. 286. (*b*) 1 Tenn. R. 351. (*c*) 1 Tenn. R. 448.

for the plaintiff, that the defendant had no legal title till the deed was made, and therefore not such a possession as would be aided by the statute. But the court, Overton sitting alone, decided that though the defendant's possession was that of his bargainor from March to August, yet he could unite the two possessions together, and the two would afford a good bar. It is most manifest that this case was decided upon the ground that there was a better outstanding title than the plaintiff's, in other words, that the younger grantee, by himself and his bargainor the defendant, had enjoyed seven years' *peaceable possession under a grant*, and so came within the express words of the statute. The case is no authority upon the question of the necessity of connexion, because there was no chasm in the defendant's title, without which the question could not arise.

The next case of Sawyer's lessee *v.* Shannon,(*a*) was in the Circuit Court of the United States for the district of West Tennessee, in June, 1809. The defendant's title was a grant to one John Eaton, younger than the plaintiff's, a judgment on *sci. fa.* against the heirs of Pinkham Eaton, naming four persons, among whom was John Eaton, by virtue of which judgment the sheriff sold the land. Molloy purchased and sold to Shannon, who took possession early in the spring of 1800, but got no deed from Molloy till August 22, 1800. The declaration in ejectment was endorsed as having issued August 15, but did not come to the marshal's hands till August 26, 1807. The defendant had no connexion with the grant to John Eaton but what was derived from the judgment. The plaintiff's counsel said they relied on the statute of 1797. When the legislature required a deed of conveyance founded on a grant, it must necessarily be *connected* with it by regular conveyances; if not, it cannot be founded on a grant. On the contrary, the counsel for the defendant contended that connexion was not necessary, but they did not wish to be understood as having no other defence than the statute of limitations. They had an older entry than the plaintiff's grant, which according to the practice of the state, they could rely on.(*b*) There was a verdict for the plaintiff, which was set aside, and a new trial granted; and at a subsequent term there was a verdict for the defendant.

This case brings us down to the year 1813, when the case of

(*a*) 1 Tenn. R. 465. (*b*) 1 Tenn. R. 471.

Patton's lessee *v.* Hynes,(*a*) occurred in the same court. Both parties claimed under one Lewallen, the grantee, but the defendant, who had been in possession more than seven years, could show no deed from Lewallen either to himself, or to any of those under whom he claimed. When the acts of 1715 and 1797 are taken together, said Judge Todd, the result will be, that a *naked possession*, by a *mere trespasser*, for the term of seven years, will be no bar to a recovery sought by the original legal owner. At the same time, I wish it understood, as the opinion of the court, that a regular chain of conveyances in due form from the grantee, is not required to authorize the statute to be a bar, the land must be first appropriated, and then to protect the possession of the defendant he must have had that possession seven years *peaceably* under *color of title.* To constitute a *color of title* there need not be a regular chain of conveyances. If the possession has been taken in such a way as to authorize the belief that the possessor imagined he was occupying his own property, that will be color of title. What will amount to this, must depend upon the particular circumstances of the case; but it has always been understood that possession under a *deed*, will be sufficient. Upon these principles the case of Sawyer *v.* Shannon, in this court, was decided; and I have no disposition to disturb it. It is of the utmost consequence that our decisions in regard to real property should be uniform.

Down to 1813, then, the two last were the only cases which unequivocally decided that connexion was not necessary to constitute the bar of the statute of 1797. These cases are liable to the following observations. Being decisions in the Circuit Court of the United States, they were not regarded by the state courts as settling the law authoritatively, and in the case of Patton's lessee *v.* Eaton,(*b*) the Supreme Court of the United States reversed them, and in giving the opinion of the court the chief justice said, 'the words "founded upon a grant" are too important to be disregarded.' The question therefore remained as unsettled as when the dispute began.

At August term, 1815, of the Supreme Court of Tennessee, the question again presented itself in the case of *Lillard et al.* v. *Elliot et al's. lessee.*(*c*) The land was granted in

(*a*) 1 Cooke's R. 356.
(*b*) 1 Wheat. 428.
(*c*) Not reported. See Peck's R. 249.

1790 to one John Elliot. Another John Elliot having removed from North Carolina into Tennessee and died before the issuance of the grant, his heirs got possession of the grant, and in 1793 conveyed to one Motherall, who, in 1803, took possession of the land, which had been held by him and those claiming under him, among whom were the defendants, to the commencement of the suit. The plaintiffs were the heirs of the John Elliot to whom the grant issued. The deficient link in the defendant's title was the want of a conveyance from the grantee. The court, consisting of Overton and Cooke, disagreed, the former being against, the latter for connexion, and the circuit court having decided for it, connexion prevailed.

In the following December the case of Weatherhead & Douglass *v.* The lessee of Bledsoe's heirs, came on in the same court.(*a*) In this case the land had been granted in 1787 to Anthony Bledsoe. Douglass recovered a judgment against one Bowman, and caused an execution of this judgment to be levied on six hundred and forty acres of the tract. It was sold, and one Lyon became purchaser, and in 1800 conveyed it to Weatherhead, who at the same time received possession and continued it till 1811, when the suit was brought. No connexion in this case appears between Bowman and the grantee, nor that he had any title whatever. The court now consisted of Overton, Cooke, and Roane, the latter having been raised to the bench after the decision of Lillard *v.* Elliot. The two former retained the opinions they had given in that case, Roane concurred with Cooke, and the cause of connexion was again triumphant. The doctrine of these two cases received further confirmation in January, 1821, in the case of Harris & Holmes *v.* The lessee of Bledsoe's heirs,(*b*) judges Emmerson and Whyte giving very elaborate judgments in favor of connexion. It was nevertheless not acquiesced in; for at July term, 1823, of the Supreme Court at Nashville, the case of Barton's lessee *v.* Shall,(*c*) came on upon a writ of error from the Circuit Court. That court had decided the case against the defendant, because he could show no conveyance from the commissioners of Nashville, in whom the legal title to the lot had originally been, to any of those under whom he claimed. He had however been in possession of the lot from 1803 to 1818, under regular deeds from 1808, with the

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(*a*) 2 Tenn. R. 352. (*b*) Peck's R. 234. (*c*) Peck's R. 213.

exception of a deed from the commissioners. The court now consisted of Haywood, Peck, and Brown. Haywood gave a most masterly opinion, and with his usual promptitude, having satisfied himself that the doctrine of the three last cases was fraught with *numerous and immense* mischiefs, and therefore not to be adopted, 'unless by express direction of the legislature,' which he could not perceive in the language of the act of 1797, he shook off their authority, and decided against the rule of connexion. Brown and Peck gave no opinions, and so the court advised. The reporter says, in his preface, which is dated in August, 1824, that this case was decided at a subsequent term, in accordance with Haywood's opinion.

The question again arose in the case of Waterhouse *v.* Martin, decided in May, 1824.(*a*) Judge Haywood, in delivering the opinion of himself and Judge Peck, remarked,—'All other acts of limitation but our own, whether of England or of our sister states, are built upon possession alone, and, in some instances, bar only the remedy for the recovery of possession. In this state not only the right of possession is barred, but the right of property also, and the adverse possessor acquires what his adversary loses. In consequence of this rule, there must be *color of title* combined with the possession.' After showing, from various cases, what *color of title* is, and giving several examples, he says—'From these examples it is perceptible that the imperfect title of a possessor to merit the protection of the act of limitations, must not be evidently unconscientious. *It must not be a deed which the possessor has forged*, or which appears, upon the face of it, to be no deed, or one by which it is apparent that the bargainor had no title.'

We will now deduce from the above cases a summary of the arguments of the advocates and opponents of connexion, and bring this article to a close.

The former contended that the language of the act of 1797 was unambiguous, and required by the words, 'a grant or deed of conveyance founded upon a grant,' that the possessor should be able to *connect* himself with a grant by an unbroken chain of mesne conveyances, commencing from the grantee; that the legislature had not only said that color of title was necessary, but they had defined the muniments that should constitute color of title, namely, a grant or deed of conveyance founded upon a grant;(*b*) that in the state of things which existed in

(*a*) Peck's R. 392. (*b*) Peck's R. 240—1, 2, 3.

Tennessee when the act was passed, it is not absurd to suppose the legislature should say to the occupiers of land,—'We are disposed to afford you all the security in our power to confer without unnecessary harshness, if not injustice, towards the real owners of land; great and unusual impediments to the assertion of their claims exist at present; it is easy for you to ascertain whether there be an apparently good title to the land on which you settle; if so, it can be perpetuated by registration, which the public interest requires should be done; do this, and if, after you have been in possession seven years, a better title should appear, you shall nevertheless be protected; but under existing circumstances, we do not think it essential to the public interest, nor are we disposed, to protect your possessions against the claim of those who have fairly, honestly, and perhaps meritoriously, acquired a legal title to the land, unless upon the production of such evidence as will warrant the belief, that, after reasonable caution and diligence, you took possession under a belief that your title authorized you to do so; this evidence we now inform you, is *a grant or deed of conveyance founded upon a grant:*' that though the title will be as defective with as without connexion, yet as defective, not good titles were to be aided, but only such defective titles as the possessor, on taking possession under them believed to be good, surely such belief is much more clearly evinced by a connected chain of titles, than by a deed which may have been executed by a person known to the bargainor to have had no pretence of title whatever, or who at least was unable to produce any evidence, tending to show that he had one; that to the objection that by requiring connexion between the deed and grant, the title will become more insecure according to the length of possession, it is answered, that when the act of limitations was passed, the evidences of title were required to be registered, by which they were generally perpetuated, by which, if lost or destroyed, some evidence of their existence could be adduced, and after long possession their existence would be presumed; that in the anxiety of the legislature to remove the inquietude respecting land titles arising out of the existence of two or more apparent titles to the same land, their attention may have been diverted from other cases having strong, if not equal claims to protection; that it is not for the courts, however, to remedy such an omission; that it is impossible to prescribe any rule of limitations which will embrace

all cases meriting protection and no others; that every general rule that can be devised will frequently prove hard, and sometimes unjust in its operation, but we can neither include cases omitted, nor exclude those embraced by the act; that when it is said that the construction which requires a connexion will leave scarcely a case on which the act can operate, and will amount almost to a repeal of the act of limitations, it is answered, that the operation of the act will be as extensive as it is believed the legislature designed, and far more extensive than the objection supposes; that the object of the act evidently was to protect possessors who after ascertaining that there was a grant for the land, had taken care to acquire a right to the possession of it, in the event the grant conferred a title to it, and that title had not been previously transferred to another; that to have required them to ascertain that there was no older grant, and that no prior conveyance of, or contract for, the land had been made, would have been to require an impossibility, and would have rendered the act wholly inoperative, because in such event the title would not have required the aid of any statute of limitations;(a) that according to the true construction of the act, a party need not establish his connexion with the grant by muniments of legal title only, but it would be no very arduous task for a possessor to see that the person from whom he purchased had an apparent right by such contract as *prima facie*, would enable him to force a conveyance in equity;(b) nay further, that an apparent equity, as a covenant or bond with condition to convey was within the contemplation of the legislature; that all these cases came within the purview of the act of 1797, because both its word and spirit admit of them, and it is reasonable and just it should be so; that one who had slept upon his rights either from neglect or fraud, should, from principles of policy, be bound by his own act in favor of the honest possessor, the fair cultivator of the soil; that this character had been claimed, however, for many to whom it did not properly belong; that the mind cannot assent to the proposition that a possession is fair and honest to which the purchaser upon the face of his title deeds must see he has no right, or where there is a chasm in his title, or a link is wanting, or where it appears that the interest or right has not passed for want of power in

(a) Peck's R. 248, 250. (b) Peck's R. 259.

the alienor; that in these cases sufficient appears upon the face of the title to warn the purchaser to beware; that these chasms or wanting links may, and ought, to be considered by him as evidence that the right had gone another way; that intermeddling under such circumstances, cannot be considered a fair possession, or such as the legislature intended by the expression, 'seven years peaceable possession of land, by virtue of a grant or deed of conveyance founded upon a grant;' and finally, that torture the words 'founded on a grant,' as you will, still they must at least mean that some connexion of some kind does exist between the deed and grant.

On the contrary, the opponents of connexion insisted, that the language of the act of 1797 was ambiguous, and needed interpretation;(*a*) that the rule of interpretation to be resorted to, was to look at the old law, the mischief, and the remedy; that the old law was the act of 1715, the mischief was the doubt which had arisen respecting its true construction; that that doubt had been abstractly whether color of title were necessary to sanctify possession, not *what* color of title was necessary; that, when the legislature determined for color of title, they had removed the doubt which had arisen, and the mischief which was the motive of their action was at an end; that to say they intended to define color of title, was to make them transcend the object which they profess to have had in view. Moreover, if there must be connexion between the possessor and the grantee, the act of 1797 would repeal the most beneficial provisions of the act of 1715, instead of explaining it as the legislature profess to do;(*b*) that the intention of the legislature manifestly was that no seven years possession should be available unless the possessor had a deed, and that the land so possessed should be granted; or, in other words, that the possession should have its foundation in, or derivation from a grant from the state; that a possession to merit the protection of the act of limitations, must not be evidently unconscientious; it must not be a deed which the possessor had forged, nor which appears upon the face of it to be no deed, or one by which it is apparent on the face of it, that the bargainor had no title;(*c*) that to give the statute any other construction, would nearly annihilate its highly beneficial provisions, which were designed to cure defects in titles, by protecting, after a

(*a*) 1 Tenn. R. 473, 4. (*b*) 1 Tenn. R. 470. (*c*) Peck's R. 409.

certain lapse of time, the honest improver and cultivator of the earth;(a) that the acts of 1715 and 1797 had precisely the same object in view, that is to say, to prove the fact that the possessor was not a trespasser known to himself to be so, and that there was not more difficulty of proving the fact by the act of 1797, than there was by the act of 1715; nor did the former require more evidence of the fact than the latter;(b) that connexion made out in evidence, is one mode of proving the fact, but if not made out, and the fact be otherwise proved, it ought to be equally available; that the proof should not in reason be rigorously restricted to a particular sort of evidence, when the same rigor is not observed in any other instance, and when the cases are infinitely more numerous where the fact can be proved, but not by that evidence, than those in which it can be so proved; that if connexion be requisite, it follows, that deeds proved, but not legally registered; registered, but not in time, or not in the proper county, not in legal form, without consideration expressed, not under seal, not in the form of a conveyance, but of a covenant, agreement, or will, or otherwise objectionable for any of the numerous defects imputable to deeds of conveyance; sheriffs' deeds for lands that have been sold for taxes, but not legally, or by process which is not in legal form, or upon judgments not legally entered, or upon executions not issued against the real owner of the land, but against one who is understood to be so, and in other cases in which the deeds are void in their origin, and which for these, or any other objections, cannot be read in evidence to prove a link in the chain, can never be made good by possession under this rule, because by their rejection the chain can never be made perfect. Lots in towns transferred by endorsements which were never registered, or the delivery of certificates stating who were the drawers of lots, or the delivery from hand of orders to the commissioners to convey to the holder, or short memoranda made in writing not under seal of the transfer of lots, could not be given in evidence to establish connexion. The fact to be proved is regarded of less consequence than the special means by which it is to be proved, and it is rather to be suppressed than established by any equivalent mode. All these cases, and innumerable others, are utterly excluded from protection by the act of

(a) 1 Tenn. R. 471. (b) Peck's R. 221.

1797, though they were entitled to it under the act of 1715. If connexion was intended by the legislature, then this exclusion was intended, but if the exclusion was not intended, then neither was connexion; that when the doctrine of connexion was first countenanced by judicial allowance, a chain of *legal* conveyances was deemed requisite; that the consequences were soon perceived, and their pernicious operations were acknowledged by the attempt to confine them, by the addition of '*equitable estates*,' to assist in forming the chain—the remedy was but partial, and a new one was added under the name of '*apparent equities*,' and still it fell short of the evils to be remedied; that it is not pretended these equitable estates and apparent equities make the legal title more perfect, and therefore they must be admitted for some other purpose, that is, to make the possessor have *color of title*, in other words, not to be a trespasser known to himself to be so. If he enters into possession under a covenant or written unsealed contract, or *verbal agreement to pay for the lands*, (?) his possession will be available, though he has no deed as the act requires. But an equity or apparent equity cannot be ripened into a legal estate by the statute, and being thus incapable of curing the evils they were meant to redress, should be laid entirely aside; that under the operation of the rule of connexion, the longer one remains in possession, the more danger there is to his title. The intermediate evidences of title are more liable to be lost in the lapse of a hundred years than of seven, and if any of them, by the burning of public offices, or of private houses, by the intrusions and devastations of war, or other natural or general calamity, be lost, so that the chain is broken, the title is gone, if connexion be indispensable; that if the legislature has really informed us by the words, 'or deed of conveyance founded upon a grant,' that no other evidence but a grant or a deed of conveyance connected with it, shall be allowed to prove a *color of title*, how is it that an equitable estate or an apparent equity proved by unsealed writing or parol, can be received in its place? Either it is not true that a connexion is the only allowable medium of proving the innocence of possession, or it cannot be true that the substituted evidence of equitable titles and apparent equities can be proper. Reject the latter and the consequences of connexion are too intolerable to be borne, and connexion must be removed; that taking into view the numerous and immense mis-

chiefs which ensue upon the doctrine of connexion, and the little good, if any, to be derived from it, the tribunals of the country should not adopt it, unless by the express direction of the legislature; that the words, '*deed of conveyance founded on a grant*,' have not necessarily this meaning and no other, if they have it at all; for on the construction of the third section of the act of 1797, which provides that if *any grantee or other person claiming by deed of conveyance founded on a grant*, be turned out of possession by law, he shall recover the value of his improvements, it was never deemed requisite for the evicted tenant to show a connexion from the grantee to himself. If the law be not so construed, then in every case where there is but one grantee, there can be no satisfaction for improvements; for if there be a connexion between the possessor and grantee, the latter cannot recover at all. (?) And if the evicted tenant can recover at all, it must be because he cannot establish a connexion, but only a deed, and nothing more. Connexion cannot be required without rejecting this whole clause, so far as regards occupation under deeds where there is but one grantee. And as most manifestly this could not have been the will of the legislature, it is demonstrably true, that the term '*founded upon a grant*,' does not here mean connexion. And it being a rule of construction that the same words used in different parts of a statute, are to receive the same interpretation, it is through this medium demonstrable, that the words '*founded upon a grant*,' in section fourth, must be understood to signify a '*deed without connexion;*' that after all the emendations that can be superadded to the rule that requires connexion to prove the innocence of possession, many cases would remain uncomprehended, which were within the act of 1715; that a rule so inflexible in the wrongful exclusion of meritorious claimants, so unjust in its operation towards them, so unfriendly to the spirit and genius of the act of 1797, so uncongenial with the public repose, which this act meant the better to secure, seemed to them opposed by all the considerations which combined in making the law; and finally, under these views, it could not be the duty of the judges, on account of any judgments already pronounced, to adhere to the rule of connexion.(*a*)

In estimating the merits of these controversies, the observa-

(*a*) Peck's R. 230.

tion forces itself upon the mind, that the abstract utility of any rule of judicial establishment, cannot compensate for the exercise of a power or establishing of it, not within judicial competency. This observation is, however, more applicable to the dispute respecting the construction of the act of 1715, than of 1797. For though the words of the latter act, '*founded upon a grant*,' seem sufficiently explicit, and, as Chief Justice Marshall observed, 'too important to be disregarded,' yet perhaps they do not necessarily imply connexion. Abstractly considered, if the law place the possessor's right to prescribe on the fairness of his original acquisition, it would be competent for him to produce any proof of that fact whatever, that would satisfy the mind of the triers. The question for the triers would be,—'Is the proof satisfactory?' not, 'Is the proof of this or that species?' Now the act of 1797 does place the right to prescribe upon the fairness of the possessor's acquisition. Very clear and unequivocal language, therefore, should have been employed to authorize the courts to restrict the possessor to one species of evidence alone. The question is,—'Do the words, "*a grant or deed of conveyance founded upon a grant*," restrict the possessor, in proving the fairness of his possession, to the production of *a grant*, or a *deed* from the grantee or some of his regular conveyers?' Perhaps it would be difficult to produce an instance of the use of the word '*founded*,' in which there is not an inseparable connexion between the subject of which it is predicated and the thing upon which that subject is said to be *founded*. Thus, the credential by which a man rightfully claims a seat in a legislative body is *founded* on an *election* of the people, and there is an inseparable *connexion* between it and the exercise of the elective franchise. There is a supposed inseparable *connexion* between an *hypothesis* and the *observations* or *experiments* upon which it is *founded*. A *verdict* is *founded* upon the *law* and *evidence*, and there ought to be the utmost *connexion* between them. In short, 'whatever is founded requires and has the utmost support.'(*a*) But legislative acts are not always to be construed with strict grammatical and logical accuracy. If they were, strange consequences would sometimes ensue. In short, it is not improbable, from the use of the same terms in the third section of the act of 1797, in a

(*a*) Crabb's Synonimes.

way which shows the legislature had not *connexion* in view, that they did not use it in the fourth section to convey that idea. And if the word *founded* is not univocal, the judges are not to blame, who gave it the interpretation that best accords with the spirit of the law in which it is found.

But those who advocated the perpetuity of the bar under the act of 1715 had, it would seem, no other foundation for their doctrine, than its supposed superior suitableness to the condition of society. This is a good motive for legislative action, but for judicial, in one case only, and that is, when the law to be administered is vague and stands in need of interpretation. But the language of the act of 1715 was not ambiguous, or if it were, its import had been well ascertained in the construction of the statute of 21 James I. c. 16, and was never doubted in North Carolina for a long time after its passage. When the judges undertook, therefore, to give it a new direction more conformable to the wants of society, they took a ground appropriated to another department of the government. But since the cause of complaint on this score, was removed in Tennessee by the act of 1797, which permitted the lapse of time to benefit rightful possessors only, it is gratifying to find that the wisdom of the Romans founded the law of usucapion and prescription upon the same principle. We recognise a strong similarity between the language of the advocates of color of title, and the following provisions of the Roman law.

'By the civil law, whoever had *fairly* obtained a thing from one whom he *supposed* the true owner, although in reality he was not, and if of a movable, had possessed it *bona fide* for one year either in Italy or the provinces; or if immovable, for two years within the limits of Italy, should prescribe to such thing by use: and this was held to be law, lest the dominion of property of things, should be uncertain.' Justinian raised the time to three years for movables, and for immovables to ten years if the parties were present (i. e. in the province,) and twenty years, if either of them were absent. Again 'no prescription lies for things that have been stolen, or seized by violence; although they have been possessed *bona fide*, during the length of time required by our constitutions: for prescription to things stolen is prohibited by a law of the twelve tables(*a*), and by the law *Atinia*;(*b*) and

(*a*) Tab. 2. L. 9. (*b*) See Cic. in Verr. II, c. 42.

the laws Julia and Plautia forbid a prescription to things seized by violence.' Further, 'as to things immovable, the law ordains, that, if any man should take possession of an estate without force, by reason either of the absence or negligence of the owner, or because he died without heirs, and (although he hath thus possessed the land dishonestly as knowing it to be the property of another) shall have made livery of it to another, who took it *bona fide*, the land by such long possession may be acquired by such taker, who took neither a thing stolen, or seized by violence.'(*a*) By adopting the rule of the Roman law, our statute avoided the artificial system of real actions consequent upon the English rule of successively divesting the owner of the right of possession and then of the right of property.(*b*)

ART. VI.—HABEAS CORPUS—SEAMAN IN THE NAVY.(*c*)

SUPREME JUDICIAL COURT, SUFFOLK, MASS. } *January* 25, 1830.

William Walker on writ of habeas corpus *v. Charles Morris, Esq. Commanding Naval Officer, Boston station.*

A seaman in the navy put under arrest before his term of service has expired, may be retained for trial by a court martial after his term has expired.

THE facts in this case, as stated by Judge Wilde, are as follows:

It appears, by the return on this writ, that the petitioner, William Walker, enlisted into the navy of the United States on the 5th day of January, 1829, for the term of one year; and that on the 3d day of January, 1830, the said Walker, being still a seaman in the navy, committed the crimes and offences of 'disobedience of orders, uttering mutinous words,' and 'raising a weapon against his superior officer, while in the execution of the duties of his office;' whereupon he was put into con-

(*a*) Inst. Lib. 2. Tit. 6.
(*b*) Harg. Co. Lit. Lib. 3. n. 155, 278.
(*c*) It is perhaps scarcely necessary to say that this case will not appear in any regularly published reports. The question which it involves is important.

finement by the respondent, Captain Morris, and on the day following, charges were preferred against him to the Secretary of the Navy, and a court martial for his trial was ordered on the 13th instant, which has been since convened.

Upon the return of the writ, the counsel for the petitioner moved the court that he should be discharged and go without day.

Heydock and *Rogers* for the prisoner. The return on this writ sets forth no authority under which the prisoner could be detained after the 4th instant. It states, that he enlisted on the 5th of January, 1829, for one year, which expired on the night of the 4th of the same month, 1830. It shows by the terms of his enlistment, that he was lawfully detained until that time, but sets forth no authority for his further detention. The ground of this motion is, that unless it is otherwise provided by some express statute, or at least some general regulations of the service, the authority of the detaining officer and all naval officers and courts martial ceased with the expiration of the term of service, and that he was no longer a seaman, but a citizen, and accountable at another tribunal. Whether he is innocent or guilty of the charges, he is no longer within their jufisdiction, and their courts martial are no longer the proper tribunals to settle the fact. It is right, that offences should be punished, but this does not give every court jurisdiction of them; and it is also right that the jurisdiction of courts and officers should be definitely prescribed by law and not extended by inferences and arguments from convenience and expediency. The question is not, whether a law to render seamen liable after the expiration of their service for offences committed before, would not with proper limitations be useful and just, but whether any such law now exists.

The case of Lord George Sackville is not in point; there are several distinctions between that case and this. He was dismissed from the service by the order of the king, and not by the sentence of any court in the first instance. But in order to restore officers thus dismissed, nothing is necessary, but a subsequent order to return to duty, and report themselves, and they are by this restored to their rights under their former commission. But if they had been otherwise discharged, a new commission would be necessary, from the date of which they would take rank.

Another point of distinction is, that the court was ordered

upon his application. We know that the courts of common law do not take jurisdiction by consent, because they are standing courts, having the same definite and constant jurisdiction, and take cognizance, or not, as a case does, or does not, come within their jurisdiction. But courts martial are created for the trial of some particular offences of some particular individual, and are dissolved when that purpose is effected.

If the prisoner is liable at all after the expiration of his term of service, he is liable *in all places, at all times, and to all officers, who have ever commanded him.*

A commanding officer may punish certain offences, and to a certain extent, without the intervention of a court; theft, under twenty dollars, at discretion; any offences with twelve lashes or imprisonment without any limits, as is provided by the 26th and 30th articles. Nor is it to be believed that it was intended to commit this unlimited power of arrest and confinement of every citizen who has once served in the navy to any officer, who may by any accident or circumstance have for a short time a separate command. Civil courts have a local jurisdiction; this extends every where. Most offences in civil courts and all in our own army, or the British army and navy, (22. Geo. 2,) must be tried within a limited time; but this would make the seamen liable, after his discharge, for life.

It may be said that the jurisdiction attached by the arrest, and must continue until punishment or discharge; but this does not follow. A process may be returnable to a court, and the court may be abolished. A suit may exist in this court against a defendant, and he may enlist in the navy or be elected a representative, and no execution can be served. The jurisdiction attached but did not continue. Yet, if the other doctrine were true, this could not be so.

We ought to state that in this case we complain of no ill treatment or abuse of authority, but of the exercise of an authority which did not exist. We barely do justice to Captain Morris, and the officers of the court martial, when we say that we know that they exercise humanely and conscientiously, what they believe to be their authority. But we insist that there is no provision in the statute for detaining the prisoner.

Aylwin, for Capt. Morris. The return to the habeas corpus shows a lawful cause of detention. It sets out that the

prisoner, being 'a person in the navy,' on the 4th of January, 1830, did commit sundry crimes, contrary to the act for the government of the navy, passed by congress, 23d of April, 1800; and was arrested on charges duly preferred against him during the period of his enlistment.

The truth of the return cannot be controverted. The only question is, whether there be any limitation to the term of prosecution, which would control the general powers conferred on courts martial, to try offenders. None exists in the law of the United States. Shall it be inferred by implication, because the individual no longer sustains the relation he once did to the government?

Congress have been careful to preserve the jurisdiction of courts martial. Thus in the revised act for punishing certain crimes against the United States, (act of 1825, c. 506, s. 11,) which invested the civil courts with authority in relation to offences committed within the territory under the exclusive jurisdiction of the general government, it declares 'that nothing herein contained shall be construed to take away or impair the right of any court martial to punish any offence which by the law of the United States may be punishable by such court.'

The general principle of law is, that wherever any act is prohibited under a penalty, and no limitation affixed to a prosecution, the offender is amenable at any time during his life.

The present question is like the one stated by Tytler, in his treatise on Courts Martial, (p. 113) arising out of the dismissal of Lord George Sackville from the English army after the battle of Minden, and his subsequent arraignment before a court martial. The point of jurisdiction was referred to the English judges, who reported that they saw no ground for doubt.

A case analogous to the present one was presented to the Supreme Court of the United States. It arose in the suit of Mott against Martin, (12 Wheat. 37.) to recover a fine imposed on a delinquent militiaman. The jurisdiction of the court martial who tried him was contested, among other reasons, because he was arraigned three years after peace had taken place, for an offence committed in a time of war.

The answer given by the court, is, that 'it would be a strained construction of the act (that of 1795) to limit the authority to the mere time of the existence of the particular exigency, when it might be thereby unable to take cognizance of and

decide upon a single offence. It is sufficient to say there is no such limitation in the act itself.'

WILDE, J. Although I have entertained no doubt respecting this case, yet as it is of great importance to the petitioner, and may materially affect the discipline of the navy, in which the public have so deep an interest, I have thought proper to consult with my brethren, the Chief Justice, and Judge Putnam, and we all concur in the opinion which I will now deliver.

[He then states the facts, as already given.]

The motion for the petitioner's discharge from the custody of Captain Morris is grounded upon the objections, that neither by the rules for the regulation of the navy, nor by any other statute, is it provided that any seaman should be detained beyond the period of his enlistment for any purpose or cause whatever; that however reasonable and convenient it might be that the law should be otherwise under the circumstances of this case, yet unless it is so provided by express statute, his officers have no authority to detain him for trial, or for any other purpose, beyond the term of his enlistment, and that such authority is not to be created by implication. If this is the clear construction of the act for the government of the navy, we must be bound by it, whatever may be the consequences, and however injurious they may be to the service of the navy. That such a construction would be highly injurious to the service and discipline of the navy, is not, and indeed cannot be denied. For many of the offences created by the act for the better government of the navy, are not punishable at common law, and of which no other courts, excepting courts martial, can take cognizance. So that if any of these offences should be committed by any seaman immediately before the expiration of his term of service, he would escape with impunity. He might be guilty of the grossest insults to his officers; of disobedience of orders in the most critical moment of danger to the ship; and in the hour of battle he might refuse to fight, and there would be no power to punish him. Or he might at any time be guilty of desertion, and if he could avoid an arrest during his term of enlistment, he might set the law at defiance. Now it is impossible to believe that a construction of the statute involving such disastrous consequences, can be conformable to the meaning and intention of congress;

nor do the words of the statute require such a construction. It is true that a seaman is not bound to do service after the expiration of his term of enlistment. But within that term he is bound to observe the rules and regulations provided by law for the government of the navy, and is punishable for all crimes and offences committed in violation of them during his term of service. There is no limitation of time within which he is to be prosecuted and tried for such offences, but if there were, it would be sufficient to show that the prosecution was commenced within the time of limitation. In this case the petitioner was arrested, or put in confinement, and charges were preferred against him to the Secretary of the Navy before the expiration of the time of his enlistment; and this was clearly a sufficient commencement of the prosecution to authorize a court martial to proceed to trial and sentence, notwithstanding the time of service had expired before the court martial had been convened. A case somewhat similar has been decided in this court under 'the act making further provision for the punishment of convicts sentenced to hard labor, and the better regulation of the state's prison.' By this act the information is to be filed and the convict brought in for trial or sentence during the time of his imprisonment on his prior conviction. A case occurred in which an information against several convicts was filed, and they were thereupon brought in for trial before their term of imprisonment had expired; but before their trial could be had, their term of imprisonment and confinement to hard labor had expired, and it was objected that the court could not then proceed in the trial. But it was held, that as the prosecution was commenced within the time limited, the jurisdiction of the court attached; and that they might regularly and legally proceed to trial and sentence. It is not therefore necessary in this case to decide whether a prosecution against a seaman in the navy for an offence committed during his time of service, can be sustained, the prosecution not having been commenced until after his term of service had expired. But the case of Lord George Sackville, as reported by Tytler, in his treatise on Courts Martial, goes fully to the support of the affirmative of this question also. It appears that doubts arose on that trial whether, as the defendant had been dismissed from his majesty's service previously to the prosecution against him, he was, by the words of the mutiny act, subject to the jurisdiction of the court; upon which that

question was referred to the twelve judges, who certified that under the circumstances of the case they saw no reason to doubt of the jurisdiction of the court martial.

It is true that that trial was had on the application of the party accused, who having been dismissed from the service during his absence from England, thought it was due to his reputation, upon his return, to demand an investigation of his conduct, to relieve himself from the disgrace. But I do not perceive that this circumstance can affect the principle of the decision; for if the court martial had no jurisdiction, it is very clear that the consent of the accused could not confer it. It is, however, for the reasons already given, unnecessary to decide on this point.

In this case there can be no doubt, I think, that the court martial have jurisdiction, and that they may legally proceed in the trial on the charges stated in the return. The petitioner, therefore, must be remanded to the custody of Captain Morris.

Art. VII.—A READING ON DAMAGES IN ACTIONS EX DELICTO.

By damages is here meant a compensation, recompense, or satisfaction, given by a jury to the plaintiff, for an injury received by him from the defendant. Co. Lit. 257; 1 Lil. Ab. 381; 2 Bl. Com. 442.

It is said by elementary writers and by compilers, that circumstances, which do not affect the act complained of, may be given in evidence to mitigate damages; and also that circumstances, which form no part of the actionable matter of a suit, may be given in evidence to aggravate damages. These are not the precise terms used in the books, but this is the precise doctrine advanced.

The proper meaning, it is apprehended, of the phrases, 'in mitigation of damages,' and 'in aggravation of damages,' is often palpably mistaken. When evidence is given for the purpose of showing that the *injury received* is greater or smaller than it would appear to be if such evidence were not introduced, it may properly be said to be received in aggravation or mitigation of damages; and in no other instance. And

it is the purpose of this examination to show that neither on principle, nor by the preponderance of authority, can damages be estimated by any other standard than the actual injury received—that the extent of the injury is the legal measure of damages. Like most other positions, however, this has its exceptions; and they should be here noticed.

In the first place, the defendant, by pleading only the general issue, may deprive himself of the right to give matter of justification in evidence; and according to some decisions, by pleading in justification matter which he fails to prove, he deprives himself of the right to give evidence that the injury done by him is less than it appears to be from the plaintiff's evidence and from legal presumptions.

In these instances, the evidence is held not to be pertinent to the issue. It is excluded, therefore, by reason of the defendant's fault; and its exclusion does not affect the *principle* on which damages are to be assessed. That principle, as ordinarily applied, is controlled or modified in its application, by other legal principles of equal importance.

In the second place, the plaintiff may not be allowed to recover to the amount of the injury sustained by him, because he elects one of two or more concurrent remedies, which, by legal rules, does not admit of the assessment of damages to that amount. This again is the fault of the party, and not of the law. Thus if goods are tortiously taken and carried away, and sold by the wrong-doer, the owner may bring trover, and recover the value of the goods; or trespass, and recover not only the value, but the unavoidable additional damage he has directly suffered; or he may wave the tort and bring assumpsit for money had and received. If he adopt the latter course, he can recover only the money for which the defendant sold the goods; and if it be less than their value, his loss is not compensated; for a recovery in assumpsit is a bar to a future action of trover or trespass. Cowp. 419, *Lindon* v. *Hooper;* 6 D. & E. 695, *Parker* v. *Norton;* 2 Ld. Raym. 1216, *Lamine* v. *Dorrell;* 5 B. & A. 765, *Laugher* v. *Brefitt.*

Again, in certain forms of action, as trover, detinue, &c. the law has settled a rule of damages, which cannot now be disturbed, although it may not, in most cases, give the plaintiff a full compensation for his injury. In trover, the value of the property at the time of conversion is the settled measure of damages, with the addition, in some courts, of interest on that

amount, to the time of judgment rendered. Evidence that the defendant supposed the goods were his own, or that he had no ill intentions, was never offered to reduce damages; nor evidence of his wantonness and malice, to enhance them. Only one circumstance is permitted to vary the rule and reduce the damages below the value of the goods, to wit: restoration, which shows the amount of the injury sustained by the defendant. Bul. N. P. 32; 6 Serg. & Rawle, 300, *Jacoby* v. *Lausatt;* 4 Pick. 466, *Kennedy* v. *Whitwell;* 14 Johns. Rep. 128, 273; 2 Caines' Cases in Error, 200; 4 Greenleaf, 274, *Rogers* v. *Crombie;* 1 Nott & M'Cord, 221, 237, 334.

Once more. In an action of debt for the escape of a prisoner in execution, the jury must give the full original debt, &c. though the prisoner be unable to pay any part of it; and interest is not recoverable, though he may have absconded beyond the reach of process, carrying a large fortune with him. This is no part of the common law of England. It is of statute origin there, though a part of the common law here. Great injustice sometimes happens under this rule of law, and it is hoped that the distinction, in this anomalous instance, between debt and trespass upon the case, will speedily be abolished by legislative interposition. See 2 Bl. Rep. 1048, *Hawkins* v. *Plomer;* 2 D. & E. 126, *Bonafous* v. *Walker;* 2 Chit. Rep. 454, *Robertson* v. *Taylor;* 2 Johns. Rep. 454, *Rawson* v. *Dole;* 7 Mass. Rep. 377, *Porter* v. *Sayward;* 2 Mason, 486, *Steere* v. *Field;* 1 N. Hamp. R. 85, *Gerrish* v. *Edson;* 3 Yeates 17; 4 ib. 47, *Shewell* v. *Fell.*

Except these, and perhaps some other examples, not now recollected, it is believed that the measure of damages is, as before stated, the extent of the injury suffered. How then are the books to be understood, which assert that the motives and intentions of the defendant, his malice or want of malice, the amount of his property, the provocation given him by the plaintiff, &c. &c. may be shown in aggravation or mitigation of damages?

It may be well to inquire what the law regards as the injury which a plaintiff receives from the defendant. In some instances, this injury, as we have seen, is the mere loss of property estimated at its value. In others, as will be seen hereafter, the insult and indignity accompanying the act, form a main part of the injury itself. Mental and bodily suffering

often constitute an important item of damages, because they are regarded as part of the injury inflicted, although no pecuniary loss attends them. For mere mental suffering, however, it seems that damages are not recoverable, unless the act which causes it be wilful. If the act be not wilfully done, the mental suffering arising from it seems to be regarded as no part of the actionable injury. See 2 Car. & Payne, 292, *Flemington* v. *Smithers*. In many other cases, the law does not regard as ground of damage those effects of the defendant's act, which cannot be *certainly* traced to it. Contingent, possible, and even probable damages, are not regarded. 1 M'Cord, 489, 585; 1 Paine's Rep. 122. 'The law,' says Mr. Hammond, 'in deciding what injuries shall entitle the suffering party to redress, has contrived certain rules that are best adapted to further the general interests of society; and though such rules are chosen as best serve the end of public utility, it is impossible for them to prevent all particular inconveniences. A case therefore of peculiar hardship and distress may sometimes arise, that considered apart and by itself is an injury well deserving of recompense, but which not being comprehended within the limits of the aforesaid regulations, it will require a violation of them to compensate.' Hammond's Nisi Prius, 43, 44, *(American edition.)* These remarks are as applicable to many particular effects of the defendant's actionable conduct, as to instances of his injurious conduct which is not actionable. See 1 Campb. 58, *Boyce* v. *Bayliffe;* 8 East, 1, *Vicars* v. *Wilcocks;* Hammond's N. P. 258, 259; Stark. on Slander, 167, *& seq.;* 4 Greenleaf, 234, *Waterhouse* v. *Gibson;* 19 Johns. Rep. 223, *Butler* v. *Kent;* 1 Chit. Pl. 388.

Can then the injury, which the law regards as actionable, be *compensated* and *satisfied* by the recovery of a sum confessedly smaller than the injury? Or in other words (in *appearance* less absurd) can circumstances, which *do not affect the degree of legal injury sustained*, be given in evidence to mitigate or aggravate damages?

Before the direct authorities on this point are examined, it may be proper to inquire into a few unquestioned principles.

It is well settled that in actions of trespass *vi et armis*, it is wholly immaterial to the support of the action *quo animo* the trespass was committed. However accidental the injury, or however strongly it may have been against the defendant's

wishes; or even if he was a lunatic, *non compos mentis*, or an infant under seven years of age, (and so not *doli capax* in legal presumption) yet he is liable to an action in this form, and to pay *some* damages. Whenever, by an act which he could have avoided, and which cannot be justified in law, a person inflicts an immediate injury by force, he is legally amenable to the party injured. Hob. 134, *Weaver* v. *Ward;* T. Jon. 205, *Dickinson* v. *Watson;* T. Ray. 421, 467, *Bessey & Olliot's case;* Aleyn, 35, *Gilbert* v. *Stone;* Sty. 72, S. C. 1 Stra. 596, *Underwood* v. *Hewson;* Onslow's Nisi Prius, 14; 2 Hen. & Munf. 423, *Taylor* v. *Rainbow;* Bac. Ab. Infancy and Age, H.; 1 Hale P. C. 15, 16; 1 Dallas, 184, 185, per M'Kean, C. J.

Aliter, in case of an unavoidable injury. Sty, 65, *Smith* v. *Stone;* 4 Mod. 405, *Gibbons* v. *Pepper;* 2 Salk. 638, S. C.; 3 Wils. 411, per De Grey, C. J.; Hammond's N. P. 67, 68.

There are also divers instances of actions of trespass upon the case, in which the defendant is liable for an injury caused by his carelesness or inattention, though his motives are unimpeachable.

Is the plaintiff's injury any less severe, are his expense and loss any less on account of the defendant's want of malice? Are they any greater, even if his malice be felonious? Why then should smaller damages be given where malice is wanting, than where it exists? If this is allowable, what becomes of the doctrine every where advanced, that in trespass *quo animo* is not a subject of inquiry?

In criminal prosecutions the public are concerned, and the law is entirely different. An assault and battery, that cannot be justified nor excused in a civil suit, is not always punishable *criminaliter*. *Actus non facit reum, nisi mens sit rea.* Co. Lit. 247; Wilmot, 263; 3 Inst. 4, 5, 6; 4 Bl. Com. c. 2. Hence accidental injuries, and those committed by lunatics, &c. and infants of a very tender age, are not subject to the animadversion of criminal law. The object of punishment is the prevention of offences; not to gratify the public resentment, but to preserve the public peace. And any provocation, which directly tends to cause a quarrel, is properly shown to the court, for the purpose of mitigating punishment. Any thing which might well be pleaded in a civil suit, in justification of a battery, may be proved on the general issue, in a criminal prosecution, and will secure an acquittal.

All this is right upon legal principles, and not only consistent with the true ends of punishment, but is also directly in furtherance of them. He who beats another, under the impulse of high provocation, does not prove himself to be so dangerous a member of the community, as he who does it wantonly, and without excitement from insult. The public is less injured and is in less danger, and the defendant less criminal, in the one case than in the other. And no principle of criminal law is more sound or more important than this, that punishment is to be proportioned to crimes. Accordingly, almost every offence not capital, was, in former days, left to be punished at the discretion of the court, according to the circumstances. Many are so punished at this day.

But in civil actions, very little discretion, (theoretically at least) is left to the jury. Damages are, indeed, in most cases of tort, to be measured by circumstances. When however the circumstances are ascertained, a 'compensation and satisfaction,' so far as money can be a compensation, are to be awarded to the plaintiff. 'The remedy is to be commensurate to the injury sustained.' 7 Mass. Rep. 256, per Sedgwick, J. 'The compensation should be equivalent to the injury. There may be some occasional departures from this principle, but I think it will be found safest to adhere to it in all cases proper for a legal indemnification in the shape of damages.' 4 Dallas, 207, per Shippen, C. J.

There would seem to be no reason why a plaintiff should receive greater damages from a defendant who has intentionally injured him, than from one who has injured him accidentally, his loss being the same in both cases. It better accords, indeed, with our natural feelings, that the defendant should suffer more in the one case than in the other; but points of mere sensibility and mere casuistry are not allowed to operate in judicial tribunals; and if they were so allowed, still it would be difficult to show that a plaintiff ought to receive a compensation beyond his injury. It would be no less difficult, either on principles of law or ethics, to prove that a defendant ought to pay more than the plaintiff ought to receive. It is impracticable to make moral duties and legal obligations, or moral and legal liabilities, coextensive.

The same principles will apply to the mitigation of damages. If the law awards damages for an injury, it would seem absurd (even without resorting to the definition of damages) to say

that they shall be for a part only of the injury. Were this the law, we might reasonably expect to find some rule of proportion fixed; as that, in case of accidental injury, the aggressor and sufferer should divide the loss, according to the Mosaic institute, and the law of some of the continental nations of Europe. Exodus, xxi. 35; Abbott on Shipping, Part III. c. 8, s. 12. On the first entrance of this doctrine into the temple of the common law, it was driven thence forever. 3 East, 18, *Kent* v. *Elstob*.

As was suggested before, the phrase, 'facts given in evidence in aggravation or mitigation of damages,' is improper, unless the facts aggravate or mitigate the injury itself. And it will be found on examination, that in nearly all the cases where this phraseology is adopted, the true meaning is, that the evidence is admissible for the purpose of showing the extent of the injury in question.

It is said in 1 Chit. Pl. 377, (2d ed.) that 'the intent of the wrong-doer is immaterial in point of law, *though it may enhance the damages.*' Reference is made to previous pages, 129, 130, in support of this assertion. But nothing is found in those pages which bears upon the point of damages. The assertion concerning damages is not sustained by the cases referred to.

There are actions of trespass upon the case, which cannot be supported without proof of evil intentions. In slander, falsehood and malice must concur, or the action cannot be maintained. And is laid down by numerous writers, that words not set forth in the declaration may be proved *in aggravation of damages.* But no case warrants this doctrine. The decisions cited to this point only show, that words not in themselves actionable, and even actionable words not laid in the count, and though uttered after action brought, may be given in evidence to evince the temper by which the defendant was actuated in speaking the words complained of. Peake's Rep. 22, *Charlter* v. *Barrett;* ib. 125, *Mead* v. *Daubigny;* ib. 166, *Lee v. Huson;* 3 Esp. Rep. 133, *Cook v. Field;* 1 Campb. 49, *n. Rustell* v. *Macquister;* 2 Campb. 72, *Finnerty* v. *Tipper;* 3 Pick. 376, *Bodwell* v. *Swan*.

As malice is an essential ingredient of slander, without proof of which (for falsehood is proof, in the absence of evidence *aliunde*) the action cannot be sustained, it is often proper, if not necessary, for the plaintiff to give evidence, positive and

explicit, that the defendant was malicious in uttering the words sued for; and not rest merely on the implication arising from the falsehood. Such evidence was admitted in the cases above cited, and in divers other cases; not to 'aggravate damages,' but to support the plaintiff's case. It would seem absurd to suppose damages might be enhanced by proof of words which are no legal ground of damage. Equally absurd and more mischievous would it seem, to suppose other actionable words, and even spoken after the suit was commenced, might be allowed in evidence for such purpose. This would be in effect to make the defendant twice liable for the same words once uttered; first, when given in evidence to enhance damages for other words, and again, in an action for the words themselves. Accordingly, it was formerly held that words in themselves actionable should not be proved to show the speaker's temper in uttering other words. But the rule since adopted would seem to be correct, if the object is, as the cases prove it to be, not to aggravate damages, but to substantiate malice. That such is the object of the proof is stated in Buller's Nisi Prius, 7, and by Lord Ellenborough, in *Stuart* v. *Lovell*, 2 Stark. Rep. 85, (American ed.) See also Stark. on Slander, 397, *& seq.* 2 Phillips' Evid. 107.

In actions for words not in themselves actionable, it can hardly be conceived that any thing can properly be shown in aggravation of damages. No damage is implied in such cases; and unless special damage is averred, the declaration is bad in any stage of the cause; unless it is proved, the plaintiff must become nonsuit, or have a verdict against him. Now when the same specific special damage, which is alleged, is the only ground of the action, all legal analogy seems to require that the evidence should be confined to the gravamen thus specially laid. And such is the rule of law in this class of cases. March on Slander, 73; Bul. N. P. 7; 1 Saund. 243, *b*, *note* (5); 10 Johns. Rep. 281, *Herrick* v. *Lapham;* 3 Yeates, 508, *Hersh* v. *Ringwalt;* 2 Phillipps' Evid. 108; 1 Chit. Pl. 389.

The plaintiff, in an action of slander, may give his character and standing in evidence, to increase damages; and the defendant may give the plaintiff's character, &c. in evidence to diminish them. 2 Ld. Raym. 831, *Brown* v. *Gibbons;* 3 Johns. Rep. 56, *Tillotson* v. *Cheetham;* 3 Mass. Rep. 546, *Larned* v. *Buffinton;* 6 ib. 518, per Parsons, C. J.; Holt's N. P. Rep. 307, *Williams* v. *Callender;* 2 Cowen, 811, *Paddock*

v. *Salisbury;* 14 Serg. & Rawle, 359, *M'Almont* v. *M'Clelland;* 2 Stark. Ev. 369, 877, *& seq.*

In both these cases, however, the evidence is received for the purpose of ascertaining *the degree of injury suffered.* 'The worth of a man's general reputation may entitle him to large damages for an attempt to injure it, which he ought not to obtain, if his character is of little or no estimation in society.' Per Parsons, C. J. *ubi sup.* 'A person of disparaged fame is not entitled to the same measure of damages with one whose character is unblemished; and it is competent to show that by evidence.' Per Lord Ellenborough, 1 M. & S. 286.

So in other actions, the character and standing of the parties may be shown, on the same principle, to affect the damages, by proportioning them to the injury. 2 Wils. 206, *Huckle* v. *Money;* 3 Hargrave's State Trials, 1071, *Pritchard* v. *Papillon.*

On the same ground, it has been held that in an action for words, the defendant may give in evidence that *at the time of uttering them* the plaintiff was generally suspected to be guilty of the charge alleged, and that *his friends had ceased to associate with him.* 2 Campb. 251, *Earl of Leicester* v. *Walter;* 1 M. & S. 284, —— v. *Moor;* 2 Phillips' Evid. 109; 1 ib. 140, (2d ed.) Whatever may be thought respecting the propriety of these decisions, it is most manifest that they proceeded entirely on the ground of proportioning damages to the injury.

Case for malicious prosecution or vexatious suit is another action of which the intention of the defendant is the gist. Malice and want of probable cause must concur, or the plaintiff cannot maintain the action. Here, therefore, as in actions of slander, an inquiry into motives and intentions goes to the action itself, and not to the amount of damages. 1 D. & E. 545; Gilb. Cas. 185, *Jones* v. *Givin;* 10 Mod. 148, 214, S. C.; Hammond's Nisi Prius, 272, 273; Co. Lit. 161, *a, note* (297) *Day's ed.*

So in a suit for falsely representing another as worthy of credit, in consequence of which a third person is injured by trusting him, fraud and deceit in the defendant are the gist of the action, and must be proved in order to warrant the recovery of damages. 2 East, 92, *Haycraft* v. *Creasy;* 8 Johns. Rep. 23, *Young v. Covell;* 12 East, 638, *note* by Mr. Day.

So in England, New York, and New Hampshire, an action will not lie against the inspectors of an election, for refusing

the vote of a qualified voter, unless malice is proved. 1 East, 563, *n. Drewe* v. *Coulton;* 2 Stark. Rep. 506, *Cullen* v. *Morris;* 11 Johns. Rep. 114, *Jenkins* v. *Waldron;* 1 New Hamp. Rep. 88, *Wheeler* v. *Patterson. Aliter,* in Massachusetts. 11 Mass. Rep. 350, *Lincoln* v. *Hapgood.*

In actions of *crim. con.* the situation and character of the parties may be shown in evidence to enhance or diminish damages. But this evidence clearly applies to the *degree of injury* sustained, and is not allowed for the purpose of aggravating or mitigating damages, in the *loose acception* of the terms. Lord Kenyon twice ruled that proof of the husband's openly living in adultery, was a ground of nonsuit in an action of this kind brought by him. Lord Alvanley, however, held that it went only in mitigation of damages, in the *proper meaning* of the terms; and his is considered the better opinion. 4 Esp. Rep. 16, *Wyndham* v. *Wycombe;* ib. 237, *Bromley* v. *Wallace;* 12 Mod. 232, *Coot* v. *Berty;* Bul. N. P. 27, 296; 1 Phil. Ev. 139, 140; 2 ib. 155; Hammond's N. P. 258; 1 Selw. N. P. 18, (1st ed.); 2 Nott & M'Cord, 267, *Torre* v. *Summers.*

The same rule of evidence is applied, and for the same purpose, in actions for the seduction of a daughter or servant. 2 Phil. Ev. 159, *& seq.;* 2 Stark. Ev. 371; 3 ib. 1310; Peake's Evid. 334, (2d ed.)

There is one class of cases in which there seems to be no pretence, on any known principle, to give evidence of malice, &c. to enhance, or of provocation, &c. to reduce, damages: Namely, when a master or husband sues for loss of service occasioned by the beating, &c. of his servant or wife. The loss of service is here the gist of the action; though trespass *vi et armis* is the proper form, as is proved by the Register and the ancient and modern adjudications. Yelv. 90, *note;* Clayt. 133, *Linley* v. *Baxter;* Keilw. 180, *b;* 7 Mod. 238, *Hallet* v. *Lawton;* Cunningham's Rep. 38, S. C.; 2 M. & S. 436, *Ditcham* v. *Bond.* (A recent decision in Maine, denying that trespass will lie in these cases, cannot be regarded as having overturned the settled law on this point; especially as that decision seems to have been made upon very slight research. 5 Greenleaf, 446, *Clough* v. *Tenney.*)(a) Surely the plaintiff's loss in these cases can be neither greater nor smaller by reason of the malice of the defendant, or of the provocation

(a) See U. S. Law Intelligencer, Vol. ii. p. 52, *& seq.*

given to him by the servant or wife. In *Edmondson* v. *Machell*, 2 D. & E. 4, damages were given, in a case of this kind, beyond the plaintiff's actual loss; and a new trial would doubtless have been granted, had not the plaintiff engaged to pay those damages to the servant, and the servant engaged not to bring an action for her own personal injury. 3 Stark. Ev. 1453.

In actions against infants under seven years of age, lunatics, and persons *non compotes mentis*, evidence of malice cannot be given to enhance damages, nor for any other purpose; for the defendants are incapable of malice. Can damages be diminished by proof, (which arises from showing the age, derangement, &c. of the defendants,) that the act complained of was not malicious? There is no adjudged case to this effect. These persons are liable for their torts. They are asserted to be, in this particular, on the same ground with persons of full age and sound mind. But if they are answerable to pay less for the same illegal act than a sane adult, there is a distinction in fact, which the law every where explicitly negatives. A plaintiff's injury from a trespass is neither more nor less from an infant's or lunatic's hand, than from any other person's of equal strength. His 'compensation' of course ought not to be increased nor lessened by circumstances which affect only the defendant. Otherwise *quo animo* becomes a material inquiry.

In actions of slander, the extreme youth or partial mental alienation of the defendant may doubtless be shown for the purpose of convincing a jury that the plaintiff has suffered but *little injury*. For the injury is greater or less, according to the credit likely to be given to the speaker, or his probable influence on others' minds. See 9 Mass. Rep. 228, *Dickinson* v. *Barber*.

Where an authority or license is given to any one by law, and he abuses or exceeds it, he is a trespasser *ab initio*. *Aliter*, where the authority is given by the party injured by its abuse or excess. Perk. s. 190, 191; Lane, 90, *Gibson's case;* 8 Co. 146, *The Six Carpenters' case;* Yelv. 96, *Bagshaw* v. *Gaward;* Noy, 119, S. C.; 10 Johns. Rep. 254, *Sackrider* v. *M'Donald*. But if the license is exceeded by mistake, or misapprehension only, are damages to be mitigated on that ground? The act, which was lawful in its inception, is as much a trespass after the authority, under which it was done,

is exceeded, as if it had been unlawful at first. The legality of the inchoate act cannot, however, be shown in evidence, in order to confine damages to the amount of the injury caused by the mere excess or abuse. If such were the law, there would be an actionable trespass, for which no damages would be recoverable. A solitary case, which seems to involve this absurdity, will be noticed hereafter.

In an action for seducing a daughter or servant, the gravamen is stated in two different forms. Sometimes the gist of the action is the breach and entry of the plaintiff's house, and the seduction matter of aggravation only. Sometimes the loss of service is the gist of the action, the declaration stating an assault, &c. upon the daughter or servant, *per quod servitium amisit.* In the first form of declaring, the breach and entry of the house must be proved, or the plaintiff cannot maintain the action. And in both forms of declaring, proof must be made of the service rendered to the plaintiff by the person seduced; else in the first, nothing can be given in damages beyond the injury caused by the unlawful breach, &c. of the house; and in the second, the plaintiff must become nonsuit. 2 D. & E. 166, *Bennett* v. *Alcott;* 3 Bur. 1878, *Postlethwaite* v. *Parkes;* 5 East, 45, *Dean* v. *Peele;* 6 Esp. Rep. 32, *Mann* v. *Barrett;* 7 Barn. & Cres. 387, *Harper* v. *Luffkin;* 1 Wend. 447, *Millar* v. *Thompson;* 2 Phil. Ev. 158; 3 Stark. Ev. 1451 *& seq.*

It is an old doctrine, to which the pleadings must now conform, that a parent, &c. cannot maintain an action for the seduction of a daughter, &c. unless there is a loss of her service. If this were *res integra*, the courts might probably sustain such action for the loss of comfort, honor, and prospects. Indeed, the *form* of action, as at present established, is little more than a fiction; and damages are not in fact confined, though they are in form, to the compensation of the mere *legal* injury. The loss of service is not the measure of damages. Here then is an instance, in which the rule of damages does not formally comport with the principle on which they are to be assessed in other cases. The reasons of the anomaly, however, approve themselves to the best moral sentiments. The real gravamen is made the rule of damages, while the legal gravamen is retained on the record. It is in effect an alteration of the law of actions. 3 Esp. R. 120, *Bedford* v. *M'Kowl;* Coxe's (N. J.) Rep. 77, *Caryell* v. *Colbaugh;* ib. 79, *Stout*

v. *Prall.* Lord Ellenborough has remarked, however, that it is 'necessary to watch that this anomaly should not be carried farther, and that the original scope of the action should not be entirely lost sight of.' 3 Campb. 520, *Dodd* v. *Norris.*

The departure, in this instance, from the common principle, is not great, when the first form of declaring, above noticed, is adopted. For it is a common learning, that in actions of trespass, evidence may be given, to enhance damages, of acts which would not alone constitute a cause of action; provided they are immediately connected with the actionable trespass, or immediately follow it. Trials per Pais, 438, (7th ed.) 2 Salk. 642, *Newman* v. *Smith;* 1 Show. 179, *Clayton* v. *Coatsworth;* 2 M. & S. 77, *Bracegirdle* v. *Orford.* This point is well discussed in Hammond's Nisi Prius, p. 43 *& seq.* And the principle is merely this, that an injury is greater, when accompanied with violence and terror, or with contumelious or menacing language, &c. &c. though such violence or language, &c. alone would not be actionable. 5 Taunt. 442, *Merest* v. *Harvey;* 3 Day, 450; 6 Conn. Rep. 520. In practice, it must be admitted that the line is often extremely shadowy. It is much to be desired that this line may be more distinctly raised.

In various cases, where no misapprehension or mistake existed, but where the defendant acted wittingly and wilfully, the courts have held, in conformity to the doctrine so often before mentioned, that the actual loss sustained by the plaintiff is the true rule of damages. Thus, whether an escape of a debtor be negligent or voluntary on the part of the officer, the real loss of the plaintiff (in an action of trespass upon the case) is the measure of the verdict. If the prisoner were wholly unable to pay, nominal damages only can be legally given. And in such a case, the plaintiff would be nonsuit, were it not for the controlling operation of another rule, to wit: that where the law has been violated, the defendant cannot justify, and the plaintiff is therefore entitled to a verdict. Thus, if one man puts his foot upon his neighbor's land, without his permission, actual or implied, he is legally a trespasser. Something must be recovered, if a suit is brought. See 2 Greenleaf, 91, *Varrill* v. *Heald;* 2 Wils. 325, *Russell* v. *Palmer;* ib. 295, *Ravenscroft* v. *Eyles;* 6 Pick. 468, *Brooks* v. *Hoyt;* 3 Stark. Ev. 1341, and cases there cited.

It is said by Lord Holt, (1 Salk. 11,) that 'in trespass the

grievousness or *consequence of the battery* is not the ground of the action, but *the measure of the damages.*' In *Boulter* v. *Clark*, Bul. N. P. 16, Chief Baron Parker refused to receive evidence that the plaintiff and defendant fought together by consent, and held that the plaintiff was entitled to a verdict for the injury done him. The same doctrine is asserted in *Matthew* v. *Ollerton*, Comb. 218; Hammond's N. P. 145, *note (q)*. In *Weaver* v. *Ward*, Hob. 134, the court overruled a plea by the defendant that he, *per infortunium et contra voluntatem suam*, hurt and wounded the plaintiff; and decided that although it might be a defence against a charge of felony, 'yet in trespass, which tends only to give *damages according to the hurt or loss*, it is not so.'

In the case before C. B. Parker, it would seem that the evidence was offered to prove the defendant not guilty, on the ground that *volenti non fit injuria*. But for whatever purpose offered, the judge would not have refused to receive it, if he had supposed it admissible for the purpose only of mitigating damages. Yet an instance can hardly be found, in which a defendant was better entitled, on popular grounds, to a mild verdict. It is true that in *Weaver* v. *Ward*, *per infortunium* was pleaded in bar, and was clearly no justification nor excuse. But it does not appear that either counsel or court thought of reducing damages, because the trespass was involuntary. They were declared to be recoverable 'according to the hurt or loss.' It would not have been proper in that case to offer evidence in mitigation, because the facts, on which it must have been contended that damages should be mitigated, were confessed by the demurrer to the bar. But being confessed, if the court had held that damages ought to be less than a 'compensation,' they would not have used language which negatives any such conclusion.

In *Watson* v. *Christie*, 2 B. & P. 224, Lord Eldon ruled at *nisi prius*, that on the general issue in an action for an assault and battery, the defendant could not give evidence that the beating was inflicted by way of correcting the plaintiff's misconduct on board a ship of which the defendant was master. His Lordship directed the jury to inquire what injury the plaintiff had sustained in consequence of the beating, and to give damages to the extent of the evil suffered. He told them that if they gave damages beyond a compensation *for the injury actually sustained*, they would give too much; but that if

they gave less, they would not give enough; and that they *could not lessen the damages on account of the circumstances under which the beating was given.* The full court 'were of opinion that his lordship's direction was perfectly right,' and thus overturned the case of *Bingham* v. *Garnault*, Bul. N. P. 17.

This decision seems to have been made on the true principle which it has been the object of the preceding remarks to present to the reader. The legal reason for excluding evidence of the circumstances under which the beating was inflicted, on the trial of the general issue, is, that matter of justification must be pleaded, or it cannot be shown *as a defence* to the action. Such is the established law. Co. Lit. 282, *b*; Clayt. 24, *Rigg's case*; Trials per Pais, 441, 446; 3 Stark. Ev. 1460. The court however went further, and held that evidence of the circumstances, though they might have supported a justification, could not be allowed to diminish the damages below the extent of the injury actually received by the plaintiff. Evidence of the circumstances of an assault, the rise and progress of the quarrel, the provocation given by the plaintiff, &c. almost unavoidably appear in the course of a trial upon any issue of fact which may be framed. But if the defendant is proved guilty on the general issue, or fails to establish a justification, the true measure of damages seems, on principle, to be 'the consequence of the battery,' as Lord Holt expresses it; or, in the words of Lord Eldon, 'the extent of the evil suffered.'

So there are decisions that if the defendant, in an action of slander, pleads the truth in justification, and fails to support his plea, he shall not be allowed to give evidence against the plaintiff's character, in mitigation of damages. There is no little confusion and contradiction on this point; but the weight both of reason and authority seems to be, that *general character*, but *not particular facts*, may be shown in mitigation of damages, even after a failure to support a plea that the words were true. Such evidence directly tends to prove the *extent of the injury* sustained by the slanderous words. See 2 Stark. Ev. 369, 878, and cases, English and American, there collected. Stark. on Slander, c. xxvii.

In an action for an assault and battery, however, the evidence of the circumstances under which the beating was given, whether offered on the trial of the general issue, or after a

failure to support a justification pleaded, does not necessarily show the extent of the injury suffered. And in a case, like that of *Watson* v. *Christie*, where the law gives an authority to the master of a vessel to correct the crew, if that authority is exceeded and abused, the master becomes a trespasser *ab initio*, and liable for *all* the suffering he inflicts. On his failing to support a justification, therefore, (if he should plead one) by reason of his excess, evidence of the plaintiff's misconduct would not tend to mitigate damages, because it would not affect the measure of his injury. This view of the matter was not taken in the case of *Sampson* v. *Smith*, 15 Mass. Rep. 365. In that case, where a master of a vessel was sued for flogging one of the crew, and failed in his justification, a new trial was granted because the judge expressed a doubt to the jury whether any punishment was justifiable *at the time* when the battery was inflicted; as that doubt might have induced the jury to increase the damages. 'It would be reasonable,' said the judge who gave the opinion of the court, 'to give greater damages, when the personal violence was wholly without excuse or justification, than when the offence consisted only in exceeding the bounds of moderation in punishing, where a right to punish existed.' Now if the excess, above what the defendant might rightfully have done, were the only legal injury received by the plaintiff, there would be nothing to object to this decision, on the score of proportioning damages to the hurt or loss. It is submitted, however, with great deference, that in the case of a trespasser *ab initio*, even the acts, which were within his authority, subject him to damages, if he superadd acts unauthorized.

It has already been mentioned that the indignity and insult accompanying an act sometimes constitute the main part of the legal injury. It may be added, that such accompaniments very often aggravate an injury which would still be serious without them. 'The circumstances of time and place, when and where the insult is given, require different damages; as it is a greater insult to be beaten upon the Royal Exchange, than in a private room.' Per Bathurst, J. 3 Wils. 19. And as a plaintiff's damages are not confined to his mere pecuniary loss, in actions of trespass, slander, &c., because that loss is not the whole of his legal injury; a jury may award damages according to the circumstances of insult which give a character to the injury. For, as before shown, acts, which alone constitute

no cause of action, aggravate the actionable injury with which they are immediately connected. There is a want of precision, however, in the language of the books on this subject. It not unfrequently is said that malicious intentions aggravate damages; that the jury may consider and give damages for the malicious intentions of the defendant. It will be found, on examination, that this is true only when these intentions induce conduct which the law regards as part at least of the injury sustained by the plaintiff, and for which he is entitled to a 'satisfaction.' In such cases, therefore, the evidence is received for the purpose of showing the extent of the injury itself, and the jury are warranted, by the principle so often mentioned as the only correct one, in enhancing damages in consequence of the malicious actionable conduct of the defendant. In the marginal abstract of *Sears* v. *Lyons*, 2 Stark. Rep. 282, it is said the jury may consider the malicious *intention* of the defendant, and give increased damages on account of such intention. That was an action for throwing poisoned barley upon the plaintiff's premises in order to poison his poultry. Abbott, J. instructed the jury that they 'might consider not only the mere pecuniary damage sustained by the plaintiff, but also the *intention* with which the act had been done, whether for *insult or injury*; that they were not confined to the mere damage resulting from throwing poisoned barley on the plaintiff's land, but might consider also the *object* with which it was thrown.' The spirit of this direction is clearly nothing more than is contained in other cases, viz: that indignity and insult aggravate the accompanying injury; not that the injury, aside from the insult, is greater on account of the plaintiff's malice. The principle of the marginal abstract, rather than of the judge's direction, is copied into Mr. Phillipps's Evidence, vol. II. p. 136. In 3 Stark. Ev. 1450, this case and others are cited to support a less inaccurate position, to wit: that 'a jury may award damages in respect of the malicious *conduct* of the defendant, and the degree of *insult* with which the trespass has been attended.' See 1 Bay, 6, *Genay* v. *Norris*; 14 Johns. Rep. 352, *Woert* v. *Jenkins*.

In *Cook* v. *Maxwell*, 2 Stark. Rep. 164, which was an action for false imprisonment, evidence was offered that the defendant *had been apprised* that the steps he was taking against the defendant were illegal; but Bayley, J. rejected it, saying, 'this could make no difference as to the damages, since the

question was not whether the defendant had acted advisedly, but whether he had acted illegally.' Mansfield, C. J. in delivering the opinion of the court of exchequer chamber in *Thorley* v. *Kerry*, 4 Taunt. 375, declared that an action for a libel was 'not maintainable upon the ground of malignity, but for the damage sustained.' This dictum, though not precisely phrased, seems to mean nothing more nor less than is contained in Mr. Starkie's assertion, that 'malice is not the criterion and measure of damages.' Stark. on Slander, 410.

In *Bennett* v. *Hyde*, 6 Conn. Rep. 24, it was held as settled law in Connecticut, that in an action of slander, evidence may be given, in aggravation of damages, that the defendant has a large amount of property. But this is put by Hosmer, C. J. expressly on the ground, that *the injury is enhanced* by being committed by a wealthy man; that 'the declarations of a man of fortune concerning the character of another, inflict a deeper wound than the same declarations made by a man of small estate.' The *application* of the principle, in this instance, may very well be questioned, without any denial of the principle itself. Mr. Starkie says it has been said that in actions for malicious prosecution, evidence of the defendant's property may be shown to aggravate damages; but he denies that it can be done on any other principle than that of proving the extent of the evil inflicted. Stark. on Sland. 402; see also 7 Pick. 86. There can be no pretence that damages are to be assessed according to the defendant's ability to pay. This notion is expressly rejected by C. J. Hosmer, and also by the court of New Jersey. See Coxe's Rep. 78, 80. Lord Mansfield mentions with approbation a verdict of heavy damages, for a gross injury, against a defendant who had no property except an income of fifty pounds *per annum*. Lofft, 774. See also 5 Price, 645, per Richards, C. B.

Against the doctrine so often above stated as the only sound one, there may be found a few decisions and dicta that ought not to be passed without notice.

Parker, C. J. in *Lincoln* v. *Hapgood*, 11 Mass. R. 357, says, if a voter is *maliciously* refused his right of voting, he ought to recover greater damages than if the refusal proceeded from mistake or ignorance only; and this is inserted in Bigelow's Digest, as an adjudged point in the law of damages. On inspecting the case, however, it will be found that the dictum of the judge was wholly gratuitous, and therefore is not an

authority, though entitled to great respect. The principles and remarks heretofore suggested, and the cases already cited, are submitted as deserving of consideration, before that dictum is received as conclusive proof of the law on the point in debate. Even on the *point adjudged* in *Lincoln* v. *Hapgood*, it has been seen that other courts have come to a different conclusion.

In *Sledge* v. *Pope*, 2 Hayw. (N. C.) Rep. 402, previous threats were held to have been rightly received in evidence to enhance damages, in an action of assault and battery. If the defendant were terrified by those threats, though they were not actionable, it might be contended *by counsel*, that they aggravated the injury subsequently inflicted in execution of them. But this would hardly receive the sanction of a court. No case has gone this length. Nothing further than *accompanying* acts, and effects *immediately connected* with the matter actionable *per se*, has been allowed to form an item in the estimate of damages given for a trespass. It was not, however, on this ground that previous threats were held admissible in the case of *Sledge* v. *Pope;* but because provocation given by the defendant may be shown in *mitigation* of damages, it was supposed to follow that such threats might be shown in *aggravation*. This reason will be found to fail, when it is recollected that only *accompanying* provocation is allowed to mitigate damages, as will presently be seen.

It is frequently said that a jury may give vindictive damages, exemplary damages, smart money, &c. See Coxe's (N. J.) Rep. *ubi sup.;* 2 Bay, 416, *Chalenor* v. *Vaughn;* 14 Johns. Rep. 352, *Woert* v. *Jenkins*.

These phrases, it is believed, are often misunderstood. If they mean that it is allowable for a jury to give damages beyond the amount of what the law regards as *actionable injury to the plaintiff*, by way of gratifying his resentment, or *punishing* the defendant for the purpose of public example, it is submitted that they are not true; that there is nothing punitive in civil actions. Damages are given as a satisfaction for an injury received by the plaintiff, not by the public. The term *vindictive*, when applied to damages given by a jury, is unfortunate, and liable to strange misapprehension. It is submitted that it means nothing more, when truly understood, than this, viz. that damages may be given for insult, contumely, and abuse, not in themselves actionable, when they

accompany an actionable injury. And that in any other sense, such damages are unknown and unwarranted by the common law.

Public offences are punished by indictment, fine, imprisonment, &c. A verdict against a defendant, in a civil suit, is no bar to a criminal prosecution for the same act; and so *e converso*. Is then a defendant to be punished twice; once in damages beyond the plaintiff's injury, for the public benefit; and again by fine or corporal punishment, for the same purpose? A doctrine that would lead to consequences which appear so preposterous and unjust, would certainly require for its support the most clear and unquestionable authority.

It must be confessed that there is authority on this point which is highly respectable, and entitled to great deference. In *Tillotson* v. *Cheetham*, 3 Johns. Rep. 56, the court of New York held, upon argument and advisement, that in an action for a libel, the jury might enhance damages on account of the pernicious effect which the publication was calculated to produce in society. Spencer, J. said, 'in vindictive actions, such as for libels, defamation, assault and battery, false imprisonment, and a variety of others, it is always given in charge to the jury, that they are to inflict damages for example's sake, and by way of punishing the defendant.' At the trial, Kent, C. J. told the jury 'that he did not accede to the doctrine that they ought not to punish the defendant in a civil action, for the pernicious effect which a publication was calculated to produce in society.' And on giving his opinion on the motion for a new trial, he said, it was the true and salutary doctrine that the evil example of libels was a consideration for increasing the damages. In connexion with this remark, he also asserted that the public character of the plaintiff was properly to be considered as an aggravation of damages; and it seems to have been to this last point that he cited 2 Wils. 206; for it has no tendency to support the first. That was an action for false imprisonment upon an arrest under a general warrant issued by Lord Halifax, in violation of *Magna Charta;* and though the defendant was in custody only six hours, and was well treated during that time, yet the court refused to set aside a verdict for £300 damages; saying the jury had done right in giving exemplary damages for a most daring attack upon the liberty of the subject. Lord Chief Justice Pratt very correctly said, that the state, degree, quality &c. of the

defendant and also of the plaintiff ought to be considered by a jury in giving damages in actions of tort; and he eloquently vindicated the right of the subject to the enjoyment of his constitutional liberties, not estimating his damages for a lawless infringement of those liberties, at the instance of 'a magistrate over all the king's subjects,' by the mere term of his confinement. Surely there is nothing in this case, which is not strictly within the principle of giving damages according to the evil suffered by the plaintiff.

The next case cited by C. J. Kent, is *Tullidge* v. *Wade*, 3 Wils. 18, where Wilmot, C. J. is reported to have said that actions for seduction of a daughter, '*are brought for example's sake.*' This is one of the earliest reported cases of that nature, and it has before been seen what the real gravamen *now* is, in the action for seduction, though the loss of service is still the legal gravamen. And upon a very careful search, it has not been found that in a single English case, subsequent to *Tullidge* v. *Wade*, has any intimation been given by the court that damages are to be enhanced for example's sake, or by way of *punishing* the defendant, or satisfying the public justice. The damages are given, not only for the loss of service and expenses consequent upon the seduction, but also for the dishonor and disgrace cast upon the plaintiff and his family by such an injury. And so it is laid down by the most approved writers, without any intimation that the defendant's evil example, or the public morals are to be taken into the account. 3 Stark. Ev. 1309; Ham. N. P. 262; 2 Phil. Ev. 157, 160. In the cases before cited from the New Jersey Reports, the evil example of the defendant's conduct is indeed spoken of as a cause of increased damages.

The only other case referred to by Kent, C. J., in support of his position that evil example is a consideration for enhancing damages, is *Pritchard* v. *Papillon*, 3 Hargrave's State Trials, 1071. That was an action for a malicious and causeless arrest of the plaintiff, while publicly acting in his office of Lord Mayor of London. It is to be remembered that malice and want of probable cause were necessary to support this action. The Lord Chief Justice told the jury that the *malicious design* must govern them in estimating damages; that in cases of persons of great quality and honor, it was not easy to prove *their particular damage;* that the malice of the design was not against Sir W. Pritchard as such a particular man,

but against the Lord Mayor; that they were to give damages to the plaintiff, not as Sir W. P. but as Lord Mayor. In all this, there is nothing incompatible with acknowledged principles. It is the same doctrine which all the cases recognise, and which was fully vindicated in the case of the general warrant, in 2 Wils. 206. But the Lord Chief Justice went still further, and told the jury that the government of the city, and the honor of the king, whose substitute the Lord Mayor was, were concerned; which put a weight upon their inquiry into damages; and that the severity of their verdict would deter all people from entering into clans and cabals to make disturbances and affront the government. A verdict was returned for £10,000 damages; whereupon his lordship complimented the jury as 'men of some sense.' This case does indeed go the length of sanctioning punishment for evil example, in a civil action. It was however regarded as a *political* case by the judge who tried it, and that judge was Sir George Jefferies. It can hardly therefore be considered as an authority for any doctrine which impugns established principles, or which rests alone on his lordship's decision. On any legal question, supposed by Sir G. Jefferies to affect 'the honor of the king,' or to be connected with an 'affront to the government,' the courts of modern times would not feel themselves imperatively bound by his decisions.

It is worthy of notice, in this connexion, that in delivering the opinion of the court of exchequer chamber, in an action for a libel, Sir James Mansfield remarked, so late as 1812, that it was curious to observe in the arguments both of judges and counsel, in almost all the cases, that they had adverted to the question whether the publication tended to a breach of the peace. 'But that,' he added, 'is wholly irrelevant, and is no ground for recovering damages.' 4 Taunt. 365. So in *Elliot* v. *Nicklin*, 5 Price, 646, Garrow, B. wholly 'disclaimed the principle which would hold that civil actions should be considered as *media* of punishment, where they are founded on moral offences.'

In *mitigation* of damages, it is submitted that nothing is legally admissible in evidence, which does not tend to show that the *injury* is less than *prima facie* it would seem.

In the case of *Bussey* v. *Donaldson*, 4 Dallas, 207, which was an action against the owner of a ship for running down the ship of the plaintiff, Smith, J. thought that as there was only

a very slight carelesness, barely sufficient to render the defendant liable, the jury had a discretion to assess a smaller sum in damages than the plaintiff's actual loss. Some lurking of a similar notion may be discerned in the opinion given by Mr. Justice Shippen, in the previous case of *Purviance* v. *Angus*, 1 Dallas, 180. But in *Bussey* v. *Donaldson*, he and Brackenridge, J. wholly repudiated it, as did M'Kean, C. J. in the former case.

In actions for words, both spoken and written, much loose language may be found in the reports, which tends, it is believed, to produce erroneous notions respecting the law of damages. Thus it is not unfrequently said, that evidence is admissible 'in extenuation of malice and in mitigation of damages,' that the defendant heard the story which he repeated, or that the libel which he published was previously printed by another person. Now it is manifest that although there MAY BE *less malice* in repeating than in originating a slander, yet it by no means follows that there is *less injury* to the plaintiff from the repetition, than from the first utterance. On the contrary, the chief, if not the only injury, may proceed from the repetition. This depends upon the time, place, and circumstances of the repeating of the words, and upon the character of the speaker. There MAY, however, be equal or greater malice in the retailer, than in the author of a slanderous report. But if the notion of *punishment* be discarded, it is immaterial what is the degree of malice; the sole question is, what is the extent of the injury? If there be what Mr. Starkie calls 'a residuum of malice' sufficient to sustain the action, the defendant, it is believed, is responsible for all the injury he has caused; and is no further liable, though his malice may be of the most atrocious nature. It may doubtless sometimes happen that the injury will be somewhat proportioned to the malice of the attack. And on the other hand, the injury not unfrequently will be almost inversely as the malice; the temper manifested by the speaker counteracting the intended effect of his words.

If evidence is at all admissible, that the defendant heard the story from another before he propagated it, or that the libel was previously published in another paper, it is (with great submission) admissible only for the purpose of showing that the *injury sustained* by the plaintiff is less than it would have been from an original uttering or publication; and not for the

purpose of 'extenuating malice.' It would seem, however, on principle, that such evidence ought not to be admitted for any purpose. For the only allowable purpose, viz. that of showing the real extent of the plaintiff's injury, it is exceedingly loose and unsatisfactory, and is liable to gross abuse. See Holt's N. P. R. 533, *Mills* v. *Spencer;* 4 Conn. Rep. 408, *Treat* v. *Browning;* 2 Stark. Ev. 880, and cases cited in the American editor's *note;* Stark. on Slander, 410.

Evidence that the plaintiff has libelled the defendant has been said to be admissible in mitigation of damages, in an action for a libel. 2 Campb. 72, *Finnerty* v. *Tipper;* 2 Stark. Ev. 877, *& note* (1). If the plaintiff is proved to be a *common libeller*, it is easy to see that his injury from a libel on himself is entitled to little consideration, because his character, being necessarily infamous, can suffer but little from a libellous attack. But it is not so readily perceived why a single libel by the plaintiff on the defendant should reduce his damages, when he sues for a libel on himself by the defendant. The law of set-off does not extend to such a case. And the last decision which has been seen, on this point, leaves a serious doubt on the question whether evidence of the plaintiff's having published a libel on the defendant is at all admissible. It was however decided that, at the furthest, such evidence could be received only in case of a libel concerning the *same matter.* 3 Barn. & Cres. 113, *May* v. *King.* If even in this restricted manner, the evidence is admissible in mitigation of damages, it must clearly be only on the ground of *provocation;* not for the purpose of showing the extent of the plaintiff's injury, but to show that the plaintiff, through his own misconduct, is not entitled to compensation for his actual injury. In other cases, however, (as will shortly be seen) provocation is allowed to be proved in mitigation of damages only when the injury *immediately* follows it, 'before the blood has time to cool;' which certainly does not hold in the case of publishing a libel.

On this doctrine of mitigating damages in consequence of provocation given by the defendant to the plaintiff, only one English case has been found. If there are more, they have eluded a laborious search. In 12 Vin. Ab. 159, it is said that in an action for slander, in the case of *Dennis* v. *Pawling*, Price, B. allowed provocation given before the speaking of the words, to be shown in mitigation of damages.

If a battery is inflicted in self-defence, it is justifiable; and no

damages can be recovered, if the pleading is correctly conducted. The plaintiff, though he has suffered, (it may be grievously,) is entitled to no redress, because he brought the evil upon himself by his own misconduct. So, it seems, if the plaintiff *provoke* the defendant by insult and abuse, and a battery or actionable words immediately ensue, the provocation, though it does not justify the defendant's acts or words, may be shown in mitigation of damages; for the plaintiff was in fault, and should bear a part of the injury which his misconduct induced. But after the blood has time to cool, if the defendant assault or slander the plaintiff, he is not regarded as a subject for clemency on account of the provocation given him. 1 Mass. Rep. 12, *Avery* v. *Ray;* 2 Root, 252, *Guernsey* v. *Morse;* 19 Johns. Rep. 319, *Lee* v. *Woolsey.*

So in an action for false imprisonment, a reasonable cause of suspicion that the plaintiff had committed a felony may be shown in mitigation of damages. Ryan & Moody, 424, *Chinn* v. *Morris.* Where a party is placed in suspicious circumstances, the law regards it as his fault or his misfortune, and very properly casts a part at least of the ill consequences upon himself. See 1 Phil. Ev. 140, (2d ed.); 2 Stark. Rep. 143, *Wallace* v. *Jarman.*

So in an action for seduction of a wife or daughter, evidence may be given in mitigation of damages, which shows that the consequence resulted in part from the improper, negligent and imprudent conduct of the plaintiff himself. 3 Stark. Ev. 1310; 2 Phil. Ev. 155.

In actions for assault and battery, the courts have some times seemed to be influenced by the rules of *criminal* law, and to have compared a civil action to an indictment for homicide, where sudden passion reduces the crime from murder to manslaughter. It is believed that this is by no means the correct view of the matter. If provocation can, on principle, be allowed to reduce damages below the actual injury received, it would seem to be only on the ground that the defendant has been culpably instrumental in bringing the mischief on himself. In this view of the doctrine, no principle, perhaps, is violated; one principle (as in divers other instances) is held to control or modify another.

It might be more satisfactory, perhaps, to minds accustomed to bring all questions to the rigid test of elementary principles, if the decisions had proceeded no further than this, viz. that

provocation shall be received as an *excuse for the insult and abuse* accompanying an injury, and which would not *in themselves* be actionable, though they ordinarily *aggravate the injury* which they accompany. The case of *Tomlinson* v. *Booth*, 2 Root, 32, illustrates the meaning here intended. That was an action of trespass for shooting the plaintiff's horse on a military parade. The defendant, who was member of a company of infantry, was allowed to show in mitigation of damages, that the plaintiff, who was a member of a company of cavalry, had violated orders and crowded on the infantry in different parts of the parade in their manœuvring, *at the time* when the horse was shot; but not at a previous manœuvring.

The value of the horse would seem, in this case, to be the least that a jury would give, even after allowing for the provocation. But if no provocation had been given, the plaintiff (as has been seen heretofore) would be entitled to what is called vindictive damages; that is, to damages for the violence, and for the insult given him on a public parade. It would seem very proper, and at variance with no principle, that the plaintiff should be limited in his damages to the value of his horse; the aggravating circumstances, which ordinarily would entitle him to vindictive damages, having been brought upon him by his own arrogance and misbehavior. One mere insult, which is not *per se* actionable, may well be offset against another.

The decisions, however, carry the effect of provocation further.

It is not to be denied that writers on natural law, and the civilians, mention rules for the estimate of damages, which depend much on the supposed moral desert of the parties. A kind of moral balance is struck, and damages adjusted accordingly. Domat says *the prudence of the judge* is to determine questions of damages; 'he joining to the light, which the principles of law and equity may give him, a prudent discernment of the circumstances, and of the regard that ought to be had to them; whether it be for *lessening* the damages that are to be adjudged, by cutting off pretensions for distant losses, and upon other considerations, if there be ground for it; as in the cases where *no bad design*, nor any fault, can be imputed to the person who is bound to make good the damages; or for *increasing* the damages which are to be given *in consideration of the intention to hurt*, if there was any.' Book iii. title v. sect. iii. 13. See also Heineccius Elem. Juris Civ. secundum

ordinem Institutionum, Lib. iv. tit. iii. Ibid. Pandectarum, Part ii. lib. ix. tit. ii. Pufendorf, Book iii. chap. i. Hutcheson's Moral Philosophy, Book ii. chap. 15.

It was probably this 'prudence of the judge,' joined to the light of a supposed natural equity, and operating according to the theory of the civil law, which produced the decree for fifty dollars damages, in the case of *Roberts* v. *Dallas*, Bee's Rep. 239. That case was in the instance court of admiralty, which is governed by the civil law, the laws of Oleron, and the customs of the admiralty, &c. The suit was for an assault and battery and false imprisonment of a seaman by the master of a vessel. The actor (plaintiff) had been mutinous on board the ship, and the master, though accompanied by a strong guard, struck him on the breast with a drawn sword, and sent him ashore under the guard. He was afterwards tried by a court martial and sentenced to receive a hundred lashes for mutiny; but the punishment was withheld at the master's request, who brought him again on board the vessel, put him in irons, and kept him for sometime on prisoner's allowance.

The judge awarded the sum abovementioned as damages to the seaman, though the blow with the sword and the confinement in irons were wholly unjustifiable. The master, having voluntarily received him on board, had no right to confine him. 'I am of opinion,' said the judge, 'that this misconduct of the captain is considerably *mitigated by the former conduct of Roberts, and by the remission of a hundred lashes awarded by the court martial, which was obtained at the captain's entreaty.*' It is certain that such a cause for mitigating damages cannot be found in the *common law*. See 2 Stark. Rep. 454, *Rhodes* v. *Leach*.

Art. VIII.—RECENT REPORTS.

1. *Reports of Cases Argued and Determined in the Court of Appeals of Maryland, in* 1826 *and* 1827. By Thomas Harris *and* Richard W. Gill. 2 *Vols.* Annapolis. Jonas Green. 1828.
2. *Connecticut Reports. Vol. VII. Part I. Or Vol. II. Part 1. of New Series. Containing the Decisions of* 1828. By Thomas Day. Hartford. Packard & Butler. 1830.

The judicial administration of the United States and of the several states, presents a spectacle of which the world had not before an example, that of more than twenty independent tribunals contemporaneously administering very similar, and, in many respects the same laws; the decisions of each one being a commentary upon those of the others, all of them thus mutually imparting light, and confirming, qualifying, and correcting the decisions of each. It is matter of interesting speculation to observe the coincidences and diversities in the application of the same principles, to the infinite variety of cases arising under all these jurisdictions; and the law, considered as science, could hardly be subjected to a severer test, than submitting its principles, so great a proportion of which in the United States are common and universal, to the independent developement and application made by these various tribunals. Should the results of these separate simultaneous judicial processes of investigation continue to be as consistent and consentaneous as they have been hitherto, and still more, should they, as they probably will, approach nearer and nearer to the same direction, they will afford the most flattering testimony in favor of the certainty and uniformity of the interpretation and practical application of legal principles, and of the laborious and learned research, sound reasoning, and moral and professional integrity of the judicial officers. In such case, which, according to the present course of decisions is not an imaginary one, the results exhibited in our journal, from quarter to quarter, of these diverse and distantly conducted proceedings for the developement of law and equity, will afford successive and striking displays of a beautiful harmony and correspondence in the operations of that intellectual, invisible power of the law, which controls the strong, protects and befriends the weak,

and, without violence, or terror, except to the wrong-doer, metes justice to all.

The two volumes of Maryland reports, standing first at the head of this article, remind us to take notice of the constitution of the courts of that state, which bears a striking resemblance to those of England, while it yet differs from them in some points. The court of appeals consists of six judges, before whom appeals and writs of error are brought from the inferior courts of law and equity; this being, as we understand the system, the supreme judicature, both in law and equity. In this circumstance the system differs from the English, if we exclude from the latter the house of lords, but agrees with it, if that house, in its judicial capacity, is included; for in the superior courts subordinate to the house of lords, those of equity are entirely distinguished from the courts of law. The house of lords, in its judicial capacity, unlike the other judicial tribunals of the kingdom, exercises the functions of both a court of law and equity, cases being brought before it both on writs of error and appeal. Whatever arguments there may be for uniting or separating the administration of justice in law and equity, in inferior tribunals, it is obvious that if it is separated, and distributed among distinct sets of tribunals of law and equity, there ought to be a common superintending jurisdiction; since without such an umpire, the independent tribunals might diverge into different and clashing systems and doctrines.

For trials by jury, the state is divided into six counties, in each of which a court is held by one of the judges of the court of appeals, assisted by the associate justices, similar to the English courts of common law, inasmuch as the judges in these latter may have the assistance of eminent barristers and sergeants at law on the circuits; but different, in that the associate justices of the Maryland circuits are regular and permanent officers of the court.

This system appears to us, to be, on the whole, admirably well constituted. It might be made a question by a foreigner whether the chief justice of each of these circuit courts, being a judge of the court of appeals, is not likely to have a predominant influence in the county courts, and in effect neutralize the voices of his associates; but such a question would only be made by a person not acquainted with the general character and habits of thinking and acting of our people (including judges among the rest), who are not by any means

in the habit of yielding implicit deference to the authority of a name or station, but rather disposed to err, if at all, in giving it too little weight. In this respect these courts are at least not liable to any greater objection, than if the trials on the circuit were had before one judge of the court of appeals sitting alone.

These two volumes of Messrs. Harris and Gill contain a little over one hundred cases, a large proportion of which, particularly in the first volume, involve important questions, and the cases are in general ably argued and skilfully reported. The abstracts, the making of which is a very material part of the reporter's labor, and on the accuracy and precision of which the usefulness of every book of reports very much depends, are well made, so that the index not only presents what the volumes do contain, but, what is equally material, nothing that they do not contain; and the subjects are arranged under appropriate heads, so that a person consulting them with a reasonable degree of legal intelligence, is pretty sure to find readily whatever they contain to his purpose.

After giving our testimony thus decidedly in favor of the general character of these volumes, we ought, perhaps, to qualify it with some few exceptions. There are not wanting instances, both in the opinions of the court and reported arguments of counsel, of too great vehemence and figurativeness of expression, for the discussion of abstract principles of law. In a case on a policy of insurance against fire, for instance, in which the question was, whether the assured had forfeited his policy in consequence of an alleged enhancement of the risk, by making repairs on the building insured, Mr. Justice Dorsey, in delivering the opinion of the court, vol. 1, p. 302, uses the following expressions: 'To infer, without any express provision or necessary implication arising out of the contract itself, or public policy demanding it, that the assured surrendered all right to make such common-place, trivial, unimportant additions to, and alterations of, his property, as its safety and his comfort and convenience might suggest, is a construction too rigorous to be rational; the effect of which would be to render worse than useless those most useful and indispensable institutions in populous cities—the fire insurance companies; and *give a fatal stab to our rising manufactures.*' This phraseology, it will be perceived at once, is not appropriate. There are a few other instances in the opinions of the courts, as well

as arguments of counsel, in which the language does not seem to be rigidly forensic and juridical; such as 'unfledged novelty,' vol. 1, p. 374, 'attributes of a marriage settlement,' p. 280. But these are slight *maculæ* that would not be worth noticing in volumes which were, in their general character, less worthy of notice. We observe a grammatical defect which is more or less current in New York, if we mistake not, but one which no authority or usage can sanction. It occurs in the second volume, p. 436, to wit, '*for the purpose it was offered,*' where the omission of '*for which*' entirely destroys the sense, as well as the grammatical construction. It is in fact no sentence. It may be thought that this is a trivial circumstance, and hardly worth noticing; and so it would be, if it were a mere accidental imperfection, but it has somewhat the appearance of a customary phrase introduced as good English, and having a construction, and being an adequate expression of sense; whereas it has no title to be so considered, and the question, therefore, becomes of more importance, to wit, whether it is expedient to introduce jargon into the law reports, in which a clear, definite, exact expression is most requisite, insomuch that a people which should not have a language of adequate clearness and precision, could not have a good code of laws or body of legal maxims, for the reason that it could not be known what were these rules of action; and we cannot perceive the practical difference between having an imperfect language, not susceptible of exact and complete expression, and using a perfect language, in a loose, confused manner. The maxim of Mirabeau that words are *things*, is quite as applicable to law as politics.

In regard to the manner of reporting these cases, though in general they are, as we have said, skilfully and faithfully reported, yet there are some few exceptions to be made to this remark. There are a few instances of that ever-besetting sin of reporters and story tellers, *repetition*. In the case of the Bank of Columbia against Fitzhugh, vol. 1, p. 239, the facts are three times stated: first by the reporter, then in his recapitulation of the record and proceedings in the court below, and again in reporting the judge's opinion. Instances of one repetition, also, occur vol. 1, p. 175, and vol. 2, p. 455 and 472. We have, heretofore, protested strenuously against such repetitions. It would be, perhaps, too much to say that our ablest reporters do not now *ever* fall into this fault, which is in

most instances the effect of mere oversight and carelesness, or a fear to assume the responsibility of transposing the facts from the judge's opinion to the beginning of the case, and afterwards in reporting his opinion, saying, as in p. 487 of the first of these volumes, that 'after stating the case,' the judge said, &c.; but they certainly commit it very rarely.

We do not put stress upon this exception in respect to these volumes, for in such examination as we have given them, we have noticed only the few instances of this fault already mentioned; but we wish to keep the attention of reporters and the profession, awake to this subject, as it is an abuse which has heretofore been most flagrantly perpetrated, and either most drowsily or indulgently tolerated. It is indeed a remarkable thing, a sort of phenomenon, that authors should publish, and readers contentedly buy, books, in which, page after page in the same volume, and in the same signature of the printers, is *verbatim et literatim* a repetition.

One other fault in reporters, is the reporting of cases merely concerning the construction of facts, or those in which these discussions occupy a large proportional space, without involving any important principle. This happens more frequently in reports of equity cases, as a confirmation of which, a recurrence to any volume of equity reports will show a much smaller space in proportion, occupied with the discussion of principles, than in law reports. It is a defect which cannot easily be remedied, perhaps, in the report of cases of this description, for it would be a very laborious task to the reporter, requiring great legal acuteness and learning, and involving a severe responsibility, to sift out of these cases only those facts upon which the decision of the court turns. It is for this reason that common law reports are incomparably more abundant in doctrines and principles, than those of equity, since the facts in the former are settled, either rightly or wrongly, by the jury, and very little scope is left for discussion on their construction. A naked, distinct, and indisputable case is presented by the verdict, and the only questions remaining are those relating to the application of legal principles to the case thus found and settled. To this general remark there are some exceptions, as in cases on written instruments, the whole construction of which is a matter of law for the court, where the course of investigation is the same as in the case of wills, the object being mainly to infer a general fact from a great variety

of provisions; and, after all, the general inference, when made in the particular case, will be of little utility in other cases, since the same combination of provisions, may rarely, if ever, be presented to the court again. A volume of reports of the discussions of matters of fact in a series of trials by jury, would be jejune and tedious enough; and yet in a series of discussions in equity cases, or in those at law, involving the construction of written instruments, is not altogether dissimilar, as a great part of the investigation in both instances, relates to the settling of the facts, or, in other words, making the *case*, which being once settled, all questions will often disappear.

In cases of this description, the reporter ought to exercise a severe scrutiny, and make the most laborious discrimination, in selecting cases for publication; that is, supposing him to have the selection, for in some courts the established practice is to report without exception, all cases decided. We do not know whether the Maryland reporters exercise a free discretion in selecting cases for publication; if they do, we cannot but think a few of those contained in these volumes might have been advantageously omitted.

The case of Ridgely against Gettings, vol. 2. p. 58, involves merely the question whether a trustee appointed for the sale of real estate under a will, upon a previous agreement that he would charge no commissions, should, notwithstanding this agreement, be entitled to commissions, and the court decided against the allowance of the claim; a case and decision that seem to be hardly worth the six pages which they occupy in this volume.

The case of Smith against Edwards, vol. 2, p. 411, was for goods alleged to be sold and delivered by Smith to the defendant. The goods were in fact sold and delivered to one Stansbury, who kept a hardware store in Baltimore, but before the purchase he had made a bill of sale of his whole stock to the defendant, who did not however take possession of it until after the sale and delivery of the goods in question in this action. If the assignment and transfer of the whole stock to Edwards, the defendant, is to be considered as taking effect from the delivery of possession, as it may be, for any thing appearing in the facts, then the case resolves itself into this question: can a man, being in possession of a stock of goods purchased by him, make a sale or assignment of those goods *bona fide* for a good consideration, without making the

vendee liable to the persons of whom the goods had been purchased by the trader, and who had not as yet been paid the price? This is a question that can hardly be made. The court decide against the plaintiff without giving any reasons. After the statement of the case, and an authority cited by the counsel for each side, the report ends, 'judgment affirmed.' It is hardly necessary to add that such a case does not contribute materially to the value of the volume. But the fault of which we have been speaking, certainly occurs in very few instances in these reports, if indeed it occurs at all, for we may be under a mistake in regard to the cases we have just noticed.

One of the most elaborate cases in these volumes is that of Ringgold against Ringgold, vol. 1, p. 11, which occupies seventy-five pages, involving questions relating to the duties and responsibility of trustees of real estate, being an appeal from the court of equity. Numerous and able counsel were engaged in the case, Messrs. Wirt, Jones, Taney, and Magruder, on one side, and Berrien, Hoffman, and Mayer, on the other. The opinion of the court was given by Mr. Justice Archer, and fills eighteen pages, and mostly with discussion of matters of principle. Buchanan, C. J. dissented from the opinion of the other judges, but his reasons are not reported. Some of the points that come up in this case will be found in our digest, under *Trust* and *Trustees*.

The case of M'Culloch again Dashiell's administrator, vol. 1, p. 6, presents a point that seems not to have been generally settled in the United States. It is a well established doctrine that partnership creditors have a preference in regard to the partnership funds, and that their debts are to be fully satisfied before the creditors of either separate partner are entitled to receive any part of their debts out of those funds; but it had not been so generally understood whether the rule was reciprocal in regard to creditors of each partner, and whether they have a right to be entirely satisfied out of his separate property, before those of the partnership can claim any part of it. When a solvent or surviving partner should pay the whole debts of the partnership, this question would not arise; for if, for this purpose, he should be obliged to make advances beyond the amount of the partnership funds, he would thereby, we presume, become a creditor of the estate of his deceased or insolvent partner, for his proportional contribution, upon the same footing as the other creditors. In this case, one partner

died and the survivor became insolvent, and the question then arose, whether the property of the deceased partner should be ratably distributed among the individual and partnership creditors, or be first applied to the payment of his individual debts, leaving the surplus, if any, to be applied to the satisfaction of the debts of the partnership. In the present case, however, there was no surplus, the property of the deceased partner not being sufficient to pay his own debts. As the question is one of general interest, and the case of not unfrequent occurrence, we extract the reasoning of Mr. Justice Archer, by whom the opinion of the court was given.

'The bill filed in this cause states that a bill of exchange was on the 18th of August 1817, drawn by the firm of *Chase* and *Tilyard* upon *Dashiell* and *Bennett*, co-partners in trade, for the sum of $ 700, in favor of the complainant, and that it was by the drawees duly accepted; that a suit was instituted against *Dashiell* and *Bennett* upon the said acceptance by the complainant; that pending the action in *Somerset* county court, the intestate of the defendant, and one of the firm of *Dashiell* and *Bennett* died, and judgment was obtained against *Bennett*, the surviving partner: That *Bennett* applied for and obtained the benefit of the insolvent laws of this state, having been finally discharged at November term 1820, no part of the claim having been paid; that the said surviving partner had no property either joint or separate, wherewith satisfaction could be made of the said debt: That *Parsons*, the respondent, took out letters of administration on the estate of *Dashiell;* and prays that a decree may pass directing the administrator to pay the amount of the acceptance from the assets of the deceased, or such part thereof as, upon a just distribution of the assets, he may, as one of his creditors, be entitled to. The bill of exchange above referred to, the judgment, and certificate of the final discharge of *Bennett*, are filed as exhibits in the cause; and the following admission of counsel is contained in the record: "That the trustee of *Richard Bennett*, an insolvent debtor, has not received any property belonging to *Bennett;* that no part of the debt due to the complainant has been paid either by the trustee, or by *Bennett;* that the personal estate of *Dashiell* is insufficient to pay his private and individual creditors; that the defendant has received of the partnership debts due to the firm of *Bennett* and *Dashiell*, $ 35 93. The parties moreover admit the exhibits above stated as testimony, and waive the formality of making either the trustee, or *Bennett*, the surviving partner, a party to these proceedings."

'The question presented for the decision of this court upon this record, is, whether the complainant is entitled to be paid an

equal proportion of his claim, with the separate creditors of *Dashiell*, out of the assets in the defendant's hands; or whether the claim, being a joint claim, shall be postponed until all the separate creditors shall be first fully paid?

'The question thus stated is one of considerable importance; and although, undoubtedly, of very frequent occurrence in the subordinate testamentary tribunals, has never, we believe, received an adjudication in the appellate court, or in any of the higher courts of original jurisdiction.

'There are very few cases in the *English* books bearing directly upon the distribution of assets, in a case situated as this is. It has been contended in argument, that it must be governed by the principles adopted in *England* in the marshalling of assets in bankruptcy. And as *they* are distributed *according to equity*, if the rule can be definitively ascertained, it ought to govern here. But an examination of the authorities, will show, that it has been very unsteady and fluctuating; varying frequently in form, often in substance, according to the ideas entertained by each succeeding chancellor, of the rights of the joint and separate creditors; and moulded more upon their notions of convenience to all the parties concerned, than as standing upon legal reasoning. *Dutton* v. *Morrison*, 17 *Ves.* 205. Amid the multitude of decisions which have taken place upon this subject, it is no easy task to trace the history of the rule of distribution in bankruptcy.

'But this examination will satisfy us, that amidst all the fluctuations of the rule, the principles established in the first cases occurring more than a century since, have but for a short period, been materially encroached upon; and that now the leading principles of distribution, with some modifications, are what they were originally established to be.

'In *Ex parte Crowder*, 2 *Vern.* 706, decided in 1715, which was an application on the part of the separate creditors, to be let in under a joint commission, the separate estate being of small value, it was decided that they might be permitted to prove their claims under the joint commission, but that the joint funds were applicable, in the first instance, to the payment of joint debts, and then the separate debts; and that the separate effects should be applied to the payment of the separate debts, and that the surplus should go to the liquidation of the joint debts. In *Ex parte Cook*, 2 *P. Wms.* 500, (in 1728), Lord Chancellor *King* followed the determination in *Ex parte Crowder*, and declared it to be settled, and that it was a resolution of convenience, that the joint creditors shall be first paid out of the partnership estate, and the separate creditors out of the separate estate of each partner, and if there be a surplus of the joint estate, besides what will pay the joint creditors, the same shall be applied to pay the separate creditors; and if there be on the other hand a surplus of the

separate estate, beyond what will pay the separate creditors, it shall go to supply any deficiency that may remain as to the joint creditors. In *Ex parte Hunter*, 1 *Atkyns*, 228, (in 1742), Lord *Hardwicke* says, as between joint and separate creditors the joint estate shall be applied to the joint creditors, and the separate estate to the separate creditors. The rule that prevailed during the administrations of Lords *King* and *Hardwicke*, from 1715 down to the time of Lord *Thurlow*, was that joint creditors could not prove under a separate commission, for the purpose of receiving dividends with the separate creditors, (*Watson on Part.* 244, *Ex parte Taitt*, 16 *Ves.* 195,) but only for the purpose of going for the surplus after the satisfaction of the separate creditors. But Lord *Thurlow* broke in upon the established practice of the court, which had prevailed for sixty years; and in 1785, in *Ex parte Hodgson*, 2 *Bro. Cha. Rep.* 5, resolved that there was no distinction between joint and separate creditors; that they ought to be paid out of the bankrupt's estate, and his moiety of the joint estate; and that the joint creditors ought to come in *pari passu*, with the separate creditors. This resolution laid down, as it is, in broad and general terms, would appear to have broken down all the boundaries previously established, between the rights and priorities of the joint and separate creditors; yet if taken with the limitations with which it is said, by *Watson on Partnership*, to have been qualified, it will appear to have made this innovation only—that they should all, joint as well as separate creditors, be permitted to prove their claims against the separate estate upon a separate commission; but that it was competent for the assignees to confine the joint creditors, where there was a joint estate, to that fund exclusively, by filing a bill in equity against the other partners, and obtaining an injunction upon the order in bankruptcy. And that this was the consequence of Lord *Thurlow's* adjudication is apparent from Lord *Rosslyn's* judgment in *Ex parte Elton*, 3 *Ves.* 238. Thus the rights of the joint and separate creditors, on their respective funds where there was a joint estate, was maintained, notwithstanding the alteration thus made in the order in bankruptcy. In the case of *Ex parte Elton*, decided in 1796, the rule established in 1785, was deemed by the then chancellor to be an inconvenient one, because every order which he passed in bankruptcy, that the joint creditor should receive a dividend out of the separate estate, might give rise to a bill in equity, on the part of the separate creditors to restrain this order and to secure the appropriation of the separate estate to the satisfaction of the separate debts; and it was adjudged, that a joint creditor might prove his claim under a separate commission, not for the purpose of receiving a dividend, until an account should be taken of what he had or might have received from the partnership effects. Thus the chancellor, in

the modification which he gave to the order in bankruptcy, exercised his equity jurisdiction, and gave to each order the operation of an injunction, without the expense of a bill, whereby the joint creditor was restrained from coming on the separate fund until, in the final adjustment of the co-partnership and individual accounts, equity should determine what portion of the separate funds should be allotted to the joint creditor. And he says, that the joint creditors are in the situation of a person having two funds. The court will not allow him to attach himself to one fund, to the prejudice of those who have no other, and *to neglect the other fund.* He has the law open to him, but if he comes to claim a distribution, the first consideration is, what is that fund from which he seeks it? It is the separate estate which is particularly attached to the separate creditors. Upon the supposition there is a joint estate, the answer is, apply yourself to that, you have a right to come upon it. The separate creditors have not. Therefore do not affect the fund attached to them, till you have obtained what you can get from the joint fund. Thus it would appear that the ancient order of distribution was restored with this modification, that the joint creditors might prove, but could not, as before, receive dividends without the further order of the chancellor, which should be made after the settlement of accounts, which were directed to be kept, as before, separate. This important principle also seems distinctly to be set up by this decision, that where there are *no joint effects*, and no solvent partner, that the joint creditors might be permitted to come in with the separate creditors, a doctrine which appears to have been first recognised by Lord *Thurlow*, in *Ex parte Hayden*, 1 *Bro. Ch. Rep.* 453, for before that period it has been seen that they could only come upon the surplus. This doctrine Lord *Eldon* has uniformly adhered to, although it will be found that he repeatedly complains of it, as a rule producing some inconveniences, and liable to several objections, as will be seen by a reference to *Ex parte Pinkerton*, 6 *Ves.* 813, *(note.)* *Ex parte Kensington*, 14 *Ves.* 447. *Ex parte Kendal*, 17 *Ves.* 521. *Ex parte Abell*, 4 *Ves.* 837. In the case of *Ex parte Kensington*, the joint creditors were forbid receiving dividends with the separate creditors, on the ground that there was one *solvent partner*, although there was *no joint estate.* That the petitioner would have been allowed had the partner been bankrupt, is the necessary inference from the case; and in the former case the joint creditors were permitted to come in where there were no joint effects, upon the ground that the solvent partner was abroad, and that therefore the difficulty was increased in resorting to him.

'Such is a succinct history of the law upon this subject, and the modern doctrine has been summarily stated by *Eden*, in his notes to *Ex parte Hodgson*, 2 *Bro. Ch. Rep.* 5, by *Vesey* in *Ex*

parte Taitt, in his 16th vol. 194, (*n*,) and also by *Maddock*, in the 2d volume of his treatise on the principles and practice of the Court of Chancery, 463. They all unite in saying, (and they are fully supported by the authorities cited by them respectively,) "that the joint creditor may prove under a separate commission, for the purpose of assenting to, or dissenting from, the commission, or of going against the surplus after the satisfaction of the separate debts, not to vote on the choice of assignees, or receive dividends with the separate creditors, (except a joint creditor who is a petitioning creditor under the commission,) or where there are *no joint effects*, or no solvent partner, or no separate debts, or the joint creditors will pay twenty shillings in the pound to the separate creditors."

'The case of *Gray* v. *Chiswell*, 9 *Ves.* 124, as it is strongly illustrative of the above doctrines, and was a case, not in bankruptcy, but in equity, will be particularly adverted to. A bill was filed by the creditors of *Cook* against the heir and executrix of *Chiswell*, claiming to come upon the real estate of *Chiswell*, for the amount of their debts, as the personal estate had been absorbed by specialty creditors. *Chiswell* had been a partner of *Nantes; Nantes* had survived him, and had become bankrupt. The joint creditors of *Nantes* and *Chiswell* proved their claims before the master. The joint estate was insolvent, being only able to *pay an inconsiderable dividend*, and the sum proposed to be raised by a sale or mortgage of *Chiswell's* real estate, was not more than sufficient to pay the separate creditors. A contest arose between the joint and separate creditors, the former insisting on their right to come in *pari passu* with the separate creditors, upon this fund, thus proposed to be raised out of his separate estate. But the Chancellor (Lord *Eldon*,) refused to permit them, upon the ground that in bankruptcy it could not be done, and that the accidental death of *Chiswell* ought not to put the joint creditors in a better situation than they would have been, had he lived and become bankrupt. If there *be any estate* for distribution among the joint creditors, although the surviving partner is bankrupt, they are not, in bankruptcy, permitted to come in with the separate creditors. The chancellor, therefore here, as in bankruptcy, would not permit the joint creditors, who had effectuated their claims under the commission against *Nantes*, although they had received but an inconsiderable dividend, to come in *pari passu* with the separate creditors. There was here *some* joint estate, and then the general rule applied, that each species of creditor must be satisfied out of the fund to which his debt particularly attaches itself; and the rule has been carried to this extent, that if there be a joint fund *of any, even the smallest description* which is capable of being realized, the rule *is inflexible*, and the joint creditors will not be permitted to receive dividends

from the separate estate. *Ex parte Peake, Gow. on Part.* 408. Thus we perceive from the case of *Gray* v. *Chiswell*, that the rule which is applied in bankruptcy, is extended to cases in equity.

'It is difficult to say upon what the rule in equity and in bankruptcy, with the modification above stated, is founded. The joint estate is benefited to the extent of every credit which is given to the firm, and so is the separate estate in the same manner enlarged by the debts it may create with any individual, and there would be unquestionably a clear equity in confining the creditors to each estate respectively, which has thus been benefited by their transactions. So far the rule is sensible and intelligible; and although at law the joint creditors may pursue both the joint and separate estate, to the extent of each, for the satisfaction of their joint demands, which are at law considered both joint and several, without the possibility of the interposition of any restraining power of a court of equity; yet when, by the death of one of the parties, the legal right survives against the surviving partner, and is extinguished against the deceased partner, a court of equity will give to the separate creditors all the advantages thus by accident thrown upon them, and will not, by adopting the rigorous rule of the law merchant, thereby injure and prejudice the separate creditor, upon whom, viewed in connexion with the separate fund, it always looks upon as meritorious and entitled in the distribution of assets to the preference. But although a court of equity, as against the separate creditors, will not adopt the law merchant, which considers the contract both joint and several; yet, whatever doubts have heretofore been entertained on the subject, where the claims of these joint creditors do not come into conflict with the separate creditors, but only with the interests of the representatives of the deceased partner, it is now undeniably settled, that equity will, as against such representatives, decree to joint creditors a satisfaction of their claims, by considering them, as they are considered at law, both joint and several.

'But although these distinctions are built on the solid foundations of reason and justice, it is not altogether so easy to perceive, why, when there is no joint fund, and *no solvent* partner, (by no solvent partner is meant bankrupt partner,) the joint creditor should thereby acquire the equitable right of coming in with the separate creditors *pari passu*, upon a fund in no manner benefited by the creation of his debt. Such, however, is the settled and established rule, as we are enabled to collect it both in bankruptcy, and in equity; and according to this rule the complainant could not, in this case, be permitted to seek indemnity for his claim from the separate estate *pari passu* with separate creditors, as it is a conceded fact in the cause, that there are joint funds,

although very inconsiderable, and greatly insufficient to pay the debt of the complainant.

'But were not this the fact, this court would have no difficulty in saying, that the complainant should be postponed to the separate creditors; and that whether there was any joint estate or not, he should not be permitted to divide with the separate creditors a fund insufficient to pay them. We are, therefore, disposed to adopt the ancient rule as more consonant to equity and justice, that the joint creditors can only look to the surplus, after the payment of the separate debts; and on the other hand, that the separate creditors can only seek indemnity from the surplus of the joint fund after the satisfaction of the joint creditors.

'It is believed that the case of *Tucker* v. *Oxley*, 5 *Cranch*, 34, somewhat militates against the views which we have taken of the *English* law upon this subject, and it has been pressed upon the court, by the appellant's counsel, as containing principles decisive of this case. It was there determined, that under the bankrupt law of the *United States*, (and the bankrupt law of *England* and that of the *United States*, so far as connected with the matter there decided, are nearly identical,) that a joint debt may be set off against the separate claim of the assignee of one of the partners, but that such set-off could not be made at law, independent of the bankrupt system. The particular decision in this case, it is not material perhaps to examine, because it was a case at law, and the relations of the parties were materially different. It would perhaps be sufficient to say, that the Supreme Court, although they conceive a legal right exists in the joint creditors to prove and receive dividends out of the separate estate, explicitly admit, that such right it is competent for a court of equity to restrain, and to compel the exercise of such right in such manner as not to prejudice or to do injustice to others. We might, in any view of the cause before us, dismiss, without further observation, the case of *Tucker* v. *Oxley;* but we cannot forbear remarking, that the case upon which the court there build their opinion, that a legal right universally exists in the joint creditors upon a separate commission to come on the separate estate *pari passu* with the separate creditors, is the case where a joint creditor is the petitioning creditor, and is an excepted case from the general rule. (*Vide* argument of Sir *Samuel Romilly* in *Ex parte Ackerman*, 14 *Ves.* 604, and the authorities referred to by *Vesey.*) *Maddock* in his first vol. 463, considers this *a singular* exception to the general rule; and the reason assigned for the adoption of the exception is, that the joint creditor, having petitioned for the commission of bankruptcy, it might be considered in the nature of a modified execution, taken out by him, as well for his own benefit as for that of the separate creditors; and that it would be against all equity to permit the separate creditors to

prevent the joint creditor from reaping the fruits of an execution taken out for his and their mutual benefit.

'Thus, without encroaching upon any decided case, and acting in strict conformity to the settled doctrines, it must be determined, that although *Bennett* is a certificated insolvent, yet as the separate estate of *Dashiell* is insufficient to pay his individual debts, the complainant, a joint creditor of *Bennett* and *Dashiell*, cannot be permitted to come in *pari passu* with the separate creditors of *Dashiell*.'

The limits by which the influence of the court upon the decisions of the jury are confined, are not very definitely settled. The law gives the parties the right of trial of facts by a jury, and no party would be permitted to introduce a witness, if witness he could be called, for the mere purpose of giving his *opinion*, whether the plaintiff should or should not recover, &c. and the question arises how far it is within the province of the court to advise or instruct the jury upon the mere facts, or rather *weight* of evidence. The judge must decide upon the evidence in some degree; as, first, whether a witness is admissible, secondly, whether a fact is relevant; but whether he may go further and instruct the jury for the purpose of either directly or indirectly influencing their minds on the question of the *weight* of the evidence, and how far he may go for this purpose, is a question, which, though well settled, perhaps, in theory, would be supposed to be involved in some doubt and obscurity, if an answer were to be sought for in the diverse practice of different judges. And though it is theoretically established that the facts are to be decided *by the jury* without any attempt, except by the counsel, to influence their minds in respect to the weight of the evidence, the inducements to exert such influence on the part of the judge are in many cases very strong, in order to rectify and counteract a groundless bias, or the great influence of the counsel of one of the parties; and still to admit directly that he may attempt such influence, is, in fact, to infringe upon the right of trial by jury; for if the influence is conceded to prevent a wrong decision, it is thereby countenanced to procure such a one. It is a subject, indeed, which can never be precisely determined and regulated in practice, for a trial by jury without the summing up of the evidence, and instruction on points of law by the judge, would be little better, in many cases, than a trial by ordeal or battle; and there is no doubt that the judge may, and he generally in fact does, and often purposely, present

the facts and law in such a manner as to lead the jury to the conclusion to which he has himself arrived; and often it is not possible to avoid doing so.

This question occurs in the case of Morris against Brickley & Caldwell, in the first of these volumes, p. 107; where Mr. Justice Dorsey, in giving the opinion of the court, says, 'This court have, on more occasions than one, determined that when there is no testimony, or when the testimony offered is so slight and inconclusive, that a rational mind could not draw the conclusions sought to be deduced from it, it is the unquestionable right of the court, and their imperious duty, when applied to for that purpose, to instruct the jury *that the plaintiff is not entitled to recover.*'

In the case of Higdon and wife against Thomas, vol. 1, p. 139, a very liberal construction is put upon that part of the statute of frauds requiring certain contracts to be in writing, and *signed* by the party, to be charged thereon. The defendant, Thomas, had written with his own hand an agreement to be signed by the attorney of the plaintiffs, stipulating to procure conveyance to him of a certain piece of land for the price of four thousand dollars to be paid for the same, and the plaintiffs afterwards conveyed the lands to Thomas, in pursuance of the agreement, and subsequently brought this action of *assumpsit* for a part of the purchase money; and the question was whether Thomas's having written, with his own hand, the agreement for the attorney of the plaintiffs to sign, whereby it appeared that he was to pay the sum of four thousand dollars for the land, and his having also brought it to the attorney to be signed by him, and his having been present at the execution of the agreement by the attorney, and consented to and approved of his executing it, was a *signing* of the agreement by *him*, Thomas, whose name appeared in the paper, so as to satisfy the statute; although he did not subscribe the paper, or do any other act towards authenticating it, except as above stated. He was, however, put in possession of the land, and continued in possession of it in pursuance of the agreement, and the subsequent conveyance, at the time of commencing this action. One difficulty in the way of bringing a suit against Thomas, upon or in virtue of the agreement, seems also to suggest itself, from the form in which it was made, being a bond conditional to *be void* on the plaintiff's making the conveyance agreed for, and yet the conveyance was the consideration upon which the

cause of this action arose against Thomas: That is, the very act whereby the bond was to become *void*, was that whereby the plaintiffs considered their right of bringing an action upon it or in pursuance of it, as having accrued. The court decided that it was a sufficient *signing* by Thomas, within the statute of frauds. The opinion of the court is given by Mr. Justice Dorsey, who investigates the subject with much learning and ability; though he confesses that the court considered the question after all, as one of some doubt.

The case of Jolly's administrator against the Baltimore Equitable Insurance Society, vol. 1, p. 245, presents a question of some interest in regard to insurance against fire. It appears that after the policy was effected, the assured undertook to make thorough repairs of the house insured, and while these repairs were making, it was set on fire by an incendiary and consumed. The objection made to the payment of the loss was, that the risk was enhanced by the making of these repairs, the undertaking of which was therefore equivalent to a deviation under a marine policy, and accordingly discharged the insurers. There have been so few cases on fire policies that almost all the authorities cited, are cases of marine insurance. One very analogous case is, however, cited by Mr. Justice Dorsey, in giving the opinion of the court, a part of whose reasoning we extract.

'The case of *Stetson* v. *The Massachusetts Fire Ins. Co.* 4 *Mass. Rep.* 330, (not cited in the argument) though not containing the same facts, yet presented for decision a question, which in principle cannot be distinguished from that now before the court. In his proposals for insurance *Stetson* represents his house, (on which insurance was required,) as connected with other buildings on one side only; and such at the time was the fact. Under the authority derived from the insured a frame building was subsequently erected and joined to the house insured, so that it became connected, in relation to other buildings, on two of its sides. It was afterwards consumed by fire, together with the building annexed to it. By one of the articles of the company (to the operation of which all persons contracting with them are subjected,) it is provided that the insurer may declare the policy null and void in all cases where the insured shall have repaired or enlarged a building, and thereby rendered the risk greater. The question submitted was in effect, whether the court could *ex natura rei* pronounce the erection of the frame building an increase of risk, or whether that fact were a matter to be found by a jury. The learned judge, by whom the opinion of the court

was pronounced, states, "that the question may be examined upon general principles, and upon the terms of the contract." In considering it on general principles he states, that "if every the least alteration or enlargement of a building insured against fire is necessarily and of course material to the risk, and whenever it is made by the act or consent of the insured, is to vacate the policy, unless it should be renewed by the insurer, so close a restraint upon the party would place contracts of this kind in a state of complete uncertainty, and would render them so inconvenient as wholly to prevent them :" That "the true reason why in a case of marine insurance, a deviation discharges the insurer, is not the increase of the risk, but that the party contracting has voluntarily substituted another voyage for that which was insured. This change of the voyage determines the contract from the time it happens. The same strictness is not requisite in an insurance against fire, where the building, although enlarged or repaired, remains the same: and it is only necessary to guard the insurer from an increase of risk, by an alteration of the building insured." He further states, that it is obvious that "an alteration may diminish and not increase the risk; and if this may be reasonably supposed in any case, then, whether the enlargement of a building insured has increased the risk of the insurer, is a question of fact to be determined by the jury."

'It should not be forgotten, that there is no express stipulation restricting the insured as to the acts of ownership he may excercise over his property, or the repairs or alterations he may cause it to undergo. All restraints of this character, therefore, arise from necessary implication, founded on the presumed intentions and understanding of the parties; and are such as are called for by the dictates of reason, justice, or public policy. Apply this doctrine to the case at bar, as exhibited in the appellant's proof, the truth of which must be conceded in granting the prayer of the appellees. All the work was done in the usual manner, and was necessary to render the house tenantable. The insurer, before he assumed the risk, viewed the property, examined its condition, considered all the casualties and incidents to which it might be liable, and, until the contrary is proved, is presumed to be as cognizant of these matters as the insured himself. Did he not know that the insured intended to derive benefit from the use and occupation of his house; that he contemplated keeping it in a tenantable condition? If so, does not reason, justice, and the understanding of the parties, revolt at the idea of an implication which should wrest from the insured the enjoyment of those important, invaluable rights, for the security of which, or an equivalent therefor, the very contract of insurance itself was effected? Nay, does not common sense, public policy, and fair dealing between man and man, demand that you should consider

it as having been the intention of the parties, and as of the very essence of the contract, that the insured should exercise such acts of ownership over his property, as were necessary to keep it in tenantable condition ?'

A case has heretofore occurred in Massachusetts—Dedham Bank against Chickering, 3 Pick. 345—in regard to the time during which the bond of a cashier of a bank continued to render his sureties responsible for his acts. In that case the cashier was elected in 1814, and again in October 1814, 1815, and 1817, by directors annually chosen, and continued to act as cashier until 1823, when he committed a breach of trust. It was held that the bond given by him on his first election, for the faithful performance of his duties as cashier, 'so long as he should continue in said office,' extended to this breach of duty; it not *appearing either in the bond itself, or the charter, records, or regulations of the bank, that the office of cashier was an annual office.*

The first of these volumes of Maryland reports, p. 324, presents a case—the Union Bank of Maryland against Ridgely—involving not precisely the same, but a somewhat similar question; and the decision accords with that in Pickering's reports. It occupies one hundred and ten pages, a greater space than is allotted to any other case in these reports, embracing many questions, the abstracts of which occupy three pages, and all of them are discussed with much ability and thoroughness, the case having been twice argued by Messrs. Mitchell and Kennedy on one side, and Messrs. Taney, R. Johnson, and Eichlenberger on the other. The opinion of the court, given by Buchanan, C. J. occupies thirty-one pages. Some of the points decided will be found among our abstracts under *Pleading*, and *Corporation.*

The point in which this case resembles that of the Dedham Bank, appears from the abstract, which states that 'where by the charter of a bank the directors were to be annually chosen, and they for the time being have the power to appoint a cashier, and such other officers under him as may be necessary for executing the business of said corporation, a cashier so appointed, is an officer of the corporation, the duration of whose office, in the absence of any express limitation, is limited only by the duration of the charter, subject to removal by the directors, as occasion might require, *and is not necessarily an annual officer.*' The charter being renewed and extended during

the time of the defendant's acting as cashier, the court accordingly held that the sureties were answerable for his acts until the expiration of the charter under which he was elected.

The case of Williamson against Dillon, vol. 1. p. 444, presents a rather curious distinction in regard to testimony, which appears, however, to be sufficiently just. One object of taking the witness's deposition was, it seems, to prove the difference, in the spring of 1817, between superfine, fine, &c. flour. In the deposition, the witness says 'that he was called on in the spring of the year 1817 to state the difference usually allowed on the sale of flour, between superfine, fine, &c. that he then stated the difference was as follows,' &c. It was held that 'this might be true, and yet the witness have no knowledge of the facts; his declaration being that he made the statement, and not that it was true;' and the court accordingly considered the deposition to be no evidence of the facts so stated.

In the same volume, p. 470, the case of Cuthell against Goodwin, again presents the question already suggested in respect to the ever-disputed boundaries of the provinces of the court and of the jury. The proposition is assumed from a former case, that where the drawer of a bill has no reasonable grounds to expect that it will be honored, he is not entitled to notice of its dishonor; and the court says that '*the reasonableness of such expectation is matter for the court, and not for the jury, to decide.* If the facts, upon which the question arises, be admitted, or be undeniable, then the question becomes exclusively a matter of law to be pronounced by the court; but if the facts be controverted, or the proof be equivocal or contradictory, then it becomes a mixed question both of fact and law, in which case the court hypothetically instruct the jury as to the law, to be by them pronounced, awarding as they find the facts.'

Our readers will remember an abstract in the last Jurist under the head *Actions*, of a case in the New Hampshire Cases, p. 69, Wiggin against Damrell in which it was said that where a note not negotiable was assigned by the payee before it was due, and after it became due, the maker orally promised to pay its contents to the assignee, the assignee could maintain an action in his *own name* against the maker. The note was given in that case, partly for money borrowed and partly for the acceptance of an order. In that case the court refer to Currier against Hodgdon, 3 N. H. Rep. 32, as specifically

deciding this point. In this latter the note was for 'thirty dollars' worth of neat stock.' See also Crocker *v.* Whitney, 10 Mass. R. 316, and Mowry *v.* Todd, 12 Mass. R. 281. In the first volume of these Maryland Reports, at page 494, a similar question occurs in Owings's executors *v.* Owings, where a distinction is made that does not appear in those above referred to. It is held in this case that a promise by the debtor to pay the debt, or discharge the obligation, whatever it may be, to the assignee, will not enable the assignee to maintain an action *in his own name;* but then the distinction is taken, that where one person pays money to another for the use of a third, this third person may maintain an action for it in his own name, (which is a well established doctrine) and also where a person having *ready money* belonging to another, agrees with that other to pay it over to a third, such third person may in this case sue in his own name. In these cases two questions occur, 1st, Whether the promise of the debtor to pay to the assignee ought to give the assignee a right of action in his own name; and if not, 2d, Whether some choses in action may be assigned so as to give the assignee such a right of action in his own name, while others cannot be so assigned. The Maryland court, if we are not mistaken, take this latter position, though we ought perhaps not to lay too great stress upon it, as it was not the principle in confirmation, and direct pursuance of which the judgment was given. But can any such distinction be made? Is a debt of money *for money*, more assignable than a debt of money *for goods*, or any other consideration? We doubt whether it can be considered so. If goods or money are specially deposited in the hands of a bailee to keep, and no right of action has accrued to the depositor or bailor, and none will accrue until demand made, in such case the depositor or bailor may sell and transfer, the deposit or thing so bailed, so as to give the vendee an action in his own name. This may be done as long as the right of possession is indisputably in the bailor or depositor, and there is no dispute about this right. But when the right of the depositor or bailor has become merely a *right of action*, whether the action be trover, trespass, assumpsit, or any other, we cannot see how the assignee can maintain an action in his own name in one case more than in another, unless this right arises on the direct consent or promise of the debtor. Why can a third party, for whose use money is paid into the hands of any person,

maintain an action in his own name for it, but because, in consideration of the receipt of it, he has expressly or virtually promised to pay it over? And why may not a past deposit by, and debt due to, A, be just as good a consideration of a direct promise to B, and give him a right of action in his own name; provided the assignment and promise be made with sufficient formality? Whether a mere oral promise of the debtor ought to give a right of action to the assignee of a written contract, might be a question. But where the promise of the debtor is given with sufficient formality, we cannot see why it should not give the right of action in the name of the assignee. Every court would indeed hold that such a transfer and promise would, in some cases, give such a right; in those, for instance, where the right of action of the original creditor is released or extinguished; though the New Hampshire court adopt a different rule, for they permit the action to be brought either in the name of the assignor or assignee. But if such a discharge of the debt, as it respects the assignor, is supposed to be necessary, in order to give the right of action in his own name to the assignee, we cannot perceive any objection to the courts considering the assignment, with consent of the debtor, as an extinguishment of the assignor's right of action. Why may it not be considered as extinguished in law as well as equity. The substantial rights and liabilities of the parties are the same in either case; what advantage then is there in compelling the assignee to borrow the assignor's name in a suit at law, when the court will punish this nominal plaintiff for contempt, if he releases the action, and will not permit a payment to him to be a satisfaction of the debt. What is the verbal acceptance of a bill of exchange but such an assignment of the funds of the drawer in the drawee's hands, as we have been speaking of? In this case the written or oral promise of the depositary, gives the holder of the bill a right of action in his own name; and, to the amount of the bill, extinguishes the right of action of the drawer against the drawee. The only question here is—What is a sufficient promise by the drawee, to give the holder and each subsequent holder, a right of action in his own name? But if the order were not negotiable, why should it the less give a right of action to the payee? Its being not negotiable, would make no difference. Now, though this may not show that a chose in action can be assigned at law, yet it proves that a chose in action, between two parties, may be extinguished,

and in consideration thereof a new chose in action arise between one of them and a third party; a doctrine of which there is, we conceive, no possible doubt. The real question in these cases, in this view, would be, what agreements, formalities, &c. amount to such extinguishment and substitution.

These volumes contain relics of the laws founded on the ancient currency of Maryland and Virginia, to wit, *tobacco*; thus in the case of Crain against Yates, vol. 2, p. 332, where the action of debt and detinet is on one bond for nine hundred and ninety-two pounds of tobacco, and another bond for money; the damages are laid in both money and tobacco. This mode of declaring is objected to by the defendant. Mr. Justice Earle, giving the opinion of the court, says, 'There is no doubt that money and tobacco debts may be sued for in the same action. If the question is tried by the common rule, which we do not mention as a fixed and unerring standard, "that two counts may be joined where the same judgment is upon both," these counts may be well united in this declaration. They are of the same nature, both being for debts, although in a different currency, and the judgment for them is so far the same, that it may be executed by one and the same final process, whether it issue against the person or property of the defendant. It has, besides, for many years, been the practice in actions of debt, to join tobacco and money counts, as a recurrence to the records of our courts will fully evince. The case of *Gordon and others against Wilson*, in 1788, and *Gordon and others against Pye*, in 1789, in the late general court, are instances of this kind, and many others, it is believed, might be easily adduced. And it has been, moreover, the invariable course, to render judgments in debt for tobacco, and for costs in current money, or for costs in tobacco at a fixed and established value in current money.'

We learn from the case of Waters's representatives against Riley's administrator, vol. 2, p. 305, that previously to 1811 the laws of Maryland were most strikingly defective in regard to remedies on bonds against the estates of deceased obligors. In this case, Riley and Waters were joint sureties for one Browning, on his administration or probate bond. After the decease of Waters, judgment was recovered against the principal, and Riley the surviving surety, and this judgment was satisfied out of Riley's estate, and his administrator accordingly demands contribution in this action from Waters's estate, and

against Waters's heirs and legal representatives. It was an appeal in chancery. Buchanan, C. J. giving the opinion of the court, said, 'In case of a joint bond the remedy at law survives against the surviving obligor, and is lost as against the representatives of him who first dies. If then, this was a suit at law, on the bond, by those interested in the estate of *Holmes*, against the representatives of *Waters*, it clearly could not be sustained, the remedy, by the death of *Waters*, having been lost as against his representatives. Nor could chancery, in proceedings between the same parties, fix the representatives of *Waters*, with a liability which did not exist at law. The general rule being, that where the remedy at law is gone, chancery will not revive it, in the absence of any accident, fraud, or mistake; to which the case of a bond, where all are principals, has been held to be an exception, each being equally benefited, and under an equal original moral obligation to pay the debt, independent of the bond, to which equity relates back, when the remedy at law on the bond is gone. But in the case of a surety, who is bound only by the bond itself, and is not under the same moral obligation to pay, equity will not interfere to charge him beyond his legal liability.'

Mr. Justice Archer dissents, and states his grounds, at length, for the opinion that Waters's estate was in this case liable to contribute. His reasoning is certainly very forcible. And his position is, evidently, so equitable, that the reader regrets to find that according to the opinion of the rest of the court, it was not supported by the laws of Maryland, before the statute of 1811, by which this defect in the laws was remedied. The bond, in this case, was made before the passage of that law.

We might notice other cases as possessing particular interest or as suggesting remarks, but we must refer our readers to the volumes themselves, and in case of their not being accessible, to our abstracts, which will present a great part of the subjects of the reporters' indexes. Of all the parties responsible for these reports, the publishers are the only ones to whom they do not do credit. The paper and typographical execution are quite indifferent.

As we have heretofore spoken particularly of Mr. Day's reports, whom we consider to be a very skilful and faithful reporter, we shall say nothing more at present, by way of general remarks, but merely notice one or two of the striking

cases contained in the part of the volume, the title of which is prefixed to this article.

This first part of Mr. Day's seventh volume contains a large proportion of important cases. The case between the two companies claiming a right to construct locks round Enfield Falls, on Connecticut River, Mr. Day's abstract of which will be found in our digest under the title *Corporation*, involves questions growing out of corporate rights and franchises, a description of questions becoming daily more interesting, as companies of this description multiply, and the amount of property in their hands accumulates. The case verges, in some points, towards that between the Charlestown and Warren Bridge Corporations, recently carried up to the Supreme Court of the United States from Massachusetts.

In Atwood *v.* Walton, p. 66, the question of the competency of a sect of the universalists to be witnesses in courts of justice, is very elaborately discussed. As the discussion has taken a new turn in this case, we quote some parts of the arguments, beginning with extracts from Mr. Justice Daggett's opinion:

'The question is not, whether a person who believes in *any* future punishment, though not endless, may be admitted as a witness;—but, whether a person who denies *all* punishment after this life, and who, in the language of the motion, believes that men will be punished in this life for their sins, but, immediately after their death, be made happy, be a competent witness.

'Nor is it necessary to ask or to answer, whether an oath shall be refused to any one, on the ground of his religious opinions. No objection is or can be made, in many such cases; nor are the rights of any individual particularly affected. Of this description are the oaths administered to electors under our constitution, oaths to support that constitution and the constitution of the *United States*, and oaths taken by judges, magistrates, &c. of all grades. But the question is, if a person denying all future accountability, is offered as a witness in a court of justice, in a case where life, liberty, property, or reputation are to be affected by his testimony, he may not be objected to, by the party against whom he is about to testify; and whether, in such case, he is a competent witness?

'Nor has the statute in this state relative to the people called *Quakers*, who decline to take the oath by reason of scruples of conscience, and for whom a substitute is provided, by affirmation, under the pains and penalties of perjury, any bearing on this question. This is a legislative enactment in alteration of the common law, which courts are bound to obey, and without

which enactment, they could not dispense with the common law oath. Besides, the pains and penalties of perjury comprised in the oath, are not limited to the statute punishment, but extend, it is believed, to the future punishment denounced against false witnesses. It is doubted whether the legislature would consent to amend that oath, by adding this qualification next after the words "pains and penalties of perjury"—"*to be inflicted in this life only.*"

'It is also true, that no declaration can be received in a court of justice without oath. The casuistical position, that an oath does not increase the obligation to speak the truth, is not yet a maxim of the common law. A man of the most exalted virtue, though judges and jurors might place the most entire confidence in his declarations, cannot be heard in a court of justice, without oath. This is a universal rule of the common law, sanctioned by the wisdom of ages, and obligatory upon every court of justice, whose proceedings are according to the course of the common law. One credible *witness* is required to establish any fact. 3 *Bla. Com.* 370.

'"Where," said the greatest and best of men, "is the security for property, for reputation, for life, if the sense of *religious obligation* desert the oaths, which are the instruments of investigation in courts of justice? And let us with caution indulge the supposition that morality can be maintained without religion." *Wash. Farewell Address.*

'Let us now examine the oath, which a witness must take, before he can be heard in a court of justice. This oath is an appeal to God, by the witness, for the truth of what he declares, and an imprecation of divine vengeance upon him, if his testimony shall be false. All law writers agree substantially in this definition, from the earliest to the latest. 1 *Phil. Ev.* 18, and cases there cited. The witness must believe in the existence of God; for it would be absurd to hear an appeal made to a being whose existence is denied. I am not aware of any doubt on this point. Many of the ablest commentators carry the principle much farther. Thus, Lord *Coke* says, generally, that an *infidel* cannot be a witness; (4 *Co. Rep.* 6, *b.*) and under this he included *Jews*, as well as heathen. 2 *Inst.* 506. 3 *Inst.* 165. Mr Sergeant *Hawkins* thought it a sufficient objection to a witness, that he believed neither the old nor the new testament. *Hawk. Pl. C. b.* 2.—*c.* 48, *sect.* 148. Lord *Hale* denied this rigid rule; (2 *Hal. Pl. C.* 279,) and it is now exploded.

'The doctrine, as now established, in this country and in *England*, is, that if a person believes in a God, the avenger of falsehood, and in a future state of rewards and punishments, he may be a witness, and not otherwise. In the case of *The King* v. *Taylor*, *Peake's Rep.* 11, a witness was called for the prosecu-

tion. The counsel for the defendant asked him, if he believed in *Jesus Christ*. This question was objected to; and *Buller*, J. overruled it, saying, it should not be put. He was then asked, if he believed in the holy gospels of God. *Buller*, J. said, that was not the proper question; and asked him, if he believed in God, the obligation of an oath, *and a future state of rewards and punishments;* and on his answering in the affirmative, he was admitted.

'I am aware, that this question may not now be put to a witness, but the course is to inquire of other witnesses as to his belief on those points, and to decide the question of admissibility on such proof. This is manifestly proper; because a man ought not to be questioned respecting his religious opinions, as the inquiry may subject him to reproach, if he should confess his infidelity; and moreover, it would seem absurd to inquire of him *under oath*, whether he does not entertain such opinions as would show that he was unfit to be sworn. If, on inquiry of witnesses, it is satisfactorily proved, that the person does not believe in a future state of *rewards* and *punishments*, there is not that tie upon his conscience, and of course, that sanction, which the law requires; and therefore, he ought not to be sworn.

'This is the rule of the common law; and there is no adjudged case, nor hardly a *dictum* in the *English* books, against it. In *Jackson* d *Tuttle* v. *Gridly*, 18 *Johns. Rep.* 98. *Curtiss* v. *Strong*, 4 *Day*, 51. *Swift's Ev.* 48. 1 *Swift's Dig.* 739, this doctrine is laid down, and the reasoning is very satisfactory. In 3 *Bla. Com.* 389, the editor, Mr. *Christian*, remarks in a note, that he has known a witness rejected and hissed out of court, who said, that he doubted the existence of a God and a future state. Mr. Justice *Story*, in a case which occurred before him and the District Judge in *Rhode Island*, in November, 1827, gave the following opinion: "We think these persons are not competent witnesses. Persons who do not believe in the existence of God, or a *future state*, or who have no religious belief, are not to be sworn as witnesses. The administration of an oath supposes, that a moral and religious accountability is felt to a Supreme Being; and this is the sanction which the law requires upon the conscience, before it admits him to testify." One of those witnesses did not believe in the existence of a God; the other did not believe in a state of future rewards and punishments here or hereafter,—indeed did not seem to have any settled religious belief. Both were rejected. The opinion of this learned judge expressly excludes a witness, who denies the existence of God, who denies a future state, or has no religious belief. Can it be seriously contended, that a person who believes he shall be made immediately happy after death, without any regard to his conduct in this life, would feel any stronger obligation to speak the truth, than one who disbelieves in a future state?

'But the decision in *Connecticut*, *Curtis* v. *Strong*, 4 *Day*, 51, must be the guide to this court. That case was elaborately discussed; it was decided by the unanimous opinion of the nine judges of the Supreme Court of Errors, within the last twenty years; and the decision has been acquiesced in. No murmurs have been heard respecting it. The reasons should be cogent to compel a departure from such a decision.

'Nor am I satisfied, that there is any principle, or precedent of high authority, opposed to it. Two of the judges of the circuit court in *New York*, at *Nisi Prius*, held, that persons of this description might testify. 2 *Cowen*, 432, 572. We are told, by the reporter, there are *many persons* in those counties where these decisions were had, who deny all future punishment. Why this is mentioned, it is not easy to perceive, unless to suggest a reason for a departure from the rule of the common law, in obedience to public opinion. On these decisions I remark, that they are directly opposed to that of the Supreme Court of the state of *New York*, in *Jackson* d. *Tuttle* v. *Gridley*, 18 *Johns. Rep.* 98. The court there say, with much force: "Religion is a subject on which every man has a right to think according to the dictates of his understanding. It is a solemn concern between his conscience and his God, with which no human tribunal has a right to intermeddle. But in the developement of facts, and the ascertainment of truth, human tribunals have a right to interfere. They are bound to see, that no man's rights are impaired or taken away, but through the medium of testimony entitled to belief; and no testimony is entitled to credit, unless delivered under the solemnity of an oath, which comes home to the conscience of the witness, and will create a tie arising from his belief that false swearing would expose him to punishment in the life to come. On this great principle rest all our institutions, and especially the distribution of justice between man and man." In this opinion I entirely concur.

'The judges above mentioned at the circuit, in commenting on this case, say, that the opinion was *obiter;* that the witness rejected did not believe in the existence of a God, *or* a *future state*, and therefore was incompetent according to all the decisions. It is true, there was this farther objection to his testimony; but still, the court, in giving its opinion, expressly decides on his disbelief in future punishment, and declares it to be a disqualification, quoting, with high approbation, the decision of *Curtiss* v. *Strong*, 4 *Day* 51.

'It is also said, that this decision rests, for much of its support, on the case of *Omychund* v. *Barker*, reported in *Willes* 549, and 1 *Atk.* 45; and that the report of the case by *Atkyns* is incorrect, and that by *Willes* gives the true state of the case. To this I would observe, that *Atkyns* furnished the case from the judges

themselves, and when the decision was pronounced. With his accuracy as a reporter, it is not credible, that he should have omitted what is now deemed important in the opinion of *Willes*. On the other hand, *Willes'* Reports were not published in more than half a century after the decision; and the manuscript was furnished by his grandson. But the point in decision, in that case, was not, whether the disbelief in future punishment disqualified the witness. It was, whether the depositions of certain *Gentoos*, sworn according to their religion, should be admitted, in relation to transactions, which took place in their country, between a native thereof and the defendant, an *Englishman*. All the judges, in giving their opinion, lay stress upon that fact; and there was no proof as to the point of the belief or unbelief of the deponents in future punishment.

'There was a consideration presented by the counsel for the plaintiff, which, by their ingenuity, was rendered plausible; and therefore, is deserving of attention. It was urged, that there are certain religionists, denominated *Antinomians*, who hold that the gospel releases Christians from all the obligations of morality, and in close connexion with this doctrine is that of the *faith of assurance, absolute election*, and the *final perseverance of the saints*. And it is hence said, that if a person is *fully assured* of his own election to eternal life, and of his *persevering* in that state, he can have no fear of future accountability or punishment, and therefore will not feel the obligation arising therefrom, in his testimony. This is not the place for considering that subject. I will, however, say, that if it should be proved respecting any person offered as a witness, that he believed his own happiness secure at death, *regardless of his conduct in this life*, he ought not to be sworn; nor would it be any recommendation of him as a witness, that he entertained this opinion of *himself and his own sect only*. He should be excluded as not feeling the obligation of an oath.

'It is urged again, that courts have no right to interfere with religious opinions. It is said, faith is a matter between men and their God, and ought not to be examined by courts or the legislature. But it is declared, by the judges in *England*, that Christianity is a part of the common law of the land. Our ancestors brought it with them to this state, and there is no statute abrogating it. Nay, our statute (*p.* 164,) punishes, by fine, imprisonment, and binding to good behavior, persons guilty of blasphemy against God, either person of the Trinity, the Christian religion, or the holy scriptures; and in *p.* 165, profane swearing, and in *p.* 385, violations of the Sabbath, are punished by fine. Our constitution declares it to be the duty of all men to worship the Supreme Being according to the dictates of their consciences. These provisions do not look like annulling Christianity. The law does not, indeed, prescribe any rules of faith, nor mode of

worship, nor attempt to enforce practical piety:—it simply recognises the great doctrines of Christianity, and preserves them from the open assaults of their enemies. This is all a legislature or court can rightfully do. But it is not easy to see how there is any interference with religious faith, in deciding a person professing certain opinions to be unfit to be sworn. What if a man should claim the right of making his *simple declaration*, and that it should be received *without oath*, because his conscience told him that an oath did not add to the obligation to speak the truth; shall such a declaration be received to affect important rights? What if a witness should declare, that there was no God;—that he believed in no God, and worshipped none;—shall he be permitted to appeal to God, and imprecate his vengeance if he speak falsely? This would be the first-born of absurdities! Yet belief in God lies at the foundation of all true religion. Hence, the court may, as it is universally conceded, ascertain the religious belief of a witness. And surely it must be done, by inquiring into the religious faith.

'It has been said, however, that this decision in excluding the witness, is a violation of the constitution of the state. I presume this argument rests on the 3d and 4th sections of the declaration of rights. The 3d section is: "The exercise and enjoyment of religious profession and worship, without discrimination, shall forever be free to all persons in this state." The 4th section is: "No preference shall be given by law to any *Christian* sect or mode of worship." It is less difficult to see, that neither of these sections can have any possible bearing on the point in judgment, than it is to answer such mere vagaries of the imagination. The plain meaning of these provisions, is, to secure an entire freedom in religious profession and worship, and an entire exclusion by law of any preference to any sect or mode of worship. No man shall be prohibited from professing what religion he pleases, or worshipping in any manner he pleases; nor shall there be any religious establishment, or approximation towards it, by any law giving any preference to any sect or mode of worship. We know, that it had been insisted by many, that formerly our laws conferred certain privileges on the located societies, and thus gave a preference to certain *Christian* sects beyond what was conceded to other denominations of *Christians*. It cannot be material to inquire whether such preference *was* given, or not. The constitution designed to remove every possibility of legislative interference in future.

'But cannot a person be free in his profession and worship, who is excluded from giving testimony, on the ground of his denial of all liability to future punishment? How does his exclusion affect his belief, profession, or mode of worship? It has no possible bearing on either.

'But his rights are infringed, or he is disturbed in the exercise and enjoyment of them. What right? Doubtless the right of giving testimony. This is a new right, privilege, or franchise, unknown, and therefore, undefined, and I may add, unheard of before, by any lawyer or judge. Suppose an elector of *Connecticut* was to appear in a court, and claim the *privilege* of testifying in a cause on trial. Neither the plaintiff nor the defendant has called him as a witness, or desires his testimony. He persists, however, in the exercise of what he calls his *franchise*, until the court, in the exercise of its discretion, is obliged to commit him for contempt, for thus disturbing the rights of the court and of the parties.

'The party may be injured, by the improper rejection of a witness, on the ground of his principles; so he may in a thousand other instances; but it is incomprehensible how the proposed witness can be, in any way, affected. If a court should reject a witness, because he was not six feet high, (if such a supposition may be made) it might deprive a party of important testimony, and thus injure him; but it could not affect the witness.

'Moreover, if the witness who denies all future punishment, cannot be excluded, without a violation of the constitution, neither can the *Atheist*. His language may be—"*I deny the existence of God,—the immortality of the soul,—and insist that men die like brutes. This is my religious profession.*" I have before shown, that it would be the height of absurdity for the court to permit such a person to *appeal to God* for the truth of what he asserts. Yet how can he be excluded, if this objection is to prevail?

'It may be added, that this objection arising out of the constitution, was not suggested, by the able and ingenious counsel, who argued the cause before this court. It may be presumed, therefore, to have had no weight, in their opinion.

'There is an opinion, said to be sanctioned by gubernatorial authority, that "*Connecticut* is an asylum for all sorts of consciences." Without saying that such an opinion is better suited to a festive occasion *ad captandum vulgus*, than to cherish elevated sentiments of religion, law, or government, I would say, if thereby it is meant, that all sorts of consciences are here *tolerated*, it is doubtless true; but if it be farther intended, that witnesses *with all sorts of consciences* are equally entitled to credit, it is denied. There are, at least, two sorts of consciences, somewhat variant in their properties. There is "a conscience void of offence towards God and towards man;" and there is a conscience "seared as with an hot iron." The *latter* should not seek an exclusive asylum; the former should also be *tolerated*. Shall we be compelled to give equal credit to the man who denies future accountability and punishment, with the man who believes them?

'I come then, necessarily to the result, that as an oath is an

indispensable means of ascertaining truth in a court of justice, so the oath necessarily implies the existence of a God, and a belief in a future state, and a punishment of some duration, in that future state; and that a witness who has no belief in these truths, is not a competent witness.

'A new trial, therefore, must be granted.

'Hosmer, Ch. J. and Lanman, J., were of the same opinion.

'*Peters*, J. I cannot concur in the opinion of Judge *Daggett*, in which I understand him to hold, that a person professing to believe in a Supreme Being, and that men are punished for their sins in this life, but are all made happy, by their Creator, immediately after death, is not a competent witness; though I fully concur in the decisions of the three great cases chiefly relied on, by him, which it was not the intention of the court below to deny or impugn. If this case cannot be distinguished from them, a new trial ought to be granted.

'By the ancient common law, *Christians* only were allowed to be sworn as witnesses; *(Co. Litt.* 6. *b.)* for an oath was considered as of *Christian* institution. "An oath," says Lord *Coke*, "is an affirmance or denial, by a *Christian* man, of any thing lawful or honest before one or more that have authority to give the same, for the advancement of truth and right, calling Almighty God to witness that his testimony is true." 3 *Inst.* 165. *cap.* 14. And in *Calvin's* case, 7 *Rep.* 17, he informs us, that "all infidels are in law perpetual enemies; for the law presumes not that they will be converted, that being a remote possibility; for between them, as with the devils, whose subjects they be, and the *Christian*, there is perpetual hostility, and can be no peace." Such was toleration in the seventeenth century, "in the reign of the most high and most illustrious king, the fountain of all *piety* and *justice*, and the life of the law!" 7 *Rep. title-page.* This notion, advanced by so great a judge, so contrary to common sense and common humanity, though sometimes doubted, (2 *Hale's P. C.* 279,) was considered as law, until 1744. *Peake's Ev.* 148. *Swift's Ev.* 48, 1 *Atk.* 21, 2, and authorities there cited.

'"In the gloomy days of superstition and ignorance," says *Dane*, "a man could not be a witness, who did not believe in the religion of the country, in which he was called to give evidence. Those who did not believe in *Christianity*, and sometimes in *Christianity* of a particular description, were deemed incapable of binding themselves by oath. But an infidel is a witness, if his infidelity extend not to atheism, both in *England* and in the *United States*, though this was not always the case." 3 *Dane's Abr.* 535.

'In *Omychund* v. *Barker*, 1 *Atk.* 21, a more liberal principle was recognised and established. In a bill in chancery before

Lord *Hardwicke*, assisted by the two Chief Justices and the Chief Baron, the deposition of certain *Gentoos*, who believed in a God, as the creator of the universe, the rewarder of virtue and the avenger of vice, and had been sworn according to the usage of the *Bramins*, by touching the hand and foot of a priest, were offered in evidence; to which two objections were made, 1, that the deponents were not *Christians*; and 2, that they were not sworn upon the *Evangelists*. These objections were argued, by the most eminent advocates of that day; and the judges delivered their opinions *seriatim*. They unanimously agreed, that the testimony of *all infidels who were not atheists*, was to be received; and that upon the principles of the common law, there was no particular form essential to an oath to be taken by a witness, but as the purpose is to bind the conscience, every man of *every religion* should be bound by that form, which he thinks will bind his conscience most. *Peake's Ev.* 149, (ed. 1809,) *Atcheson* v. *Everett*, *Cowp.* 389.

'These were the only points made and decided; and it is remarkable, that neither of the learned counsel, nor of the more learned judges, intimated that a belief in future rewards and punishments was essential to a witness.

'Chief Justice *Willes* is, indeed, made to say, that infidels who believe a God, and future rewards and punishments in the other world, may be witnesses; yet if they [infidels] do not believe a God or future rewards and punishments, they ought not to be admitted as witnesses. 1 *Atk.* 45. But in his own report of his own opinion, he says: "Nothing but the belief of a God, and that he will reward and punish *us* according to our deserts, is necessary to qualify a man to take the oath." *Willes' Rep.* 545. Again: "Infidels, who believe a God, and that he will punish them, if they swear falsely, in some cases, and under some circumstances, may and ought to be admitted witnesses, in this, though a *Christian* country. On the other hand, I am clearly of opinion, that such infidels, if any such there be, who either do not believe a God, or if they do, do not think he will either reward or punish them, in *this world* or the next, cannot be witnesses, in any case, or under any circumstances, for this plain reason, because an oath cannot possibly be any tie or obligation upon them." *Willes' Rep.* 549. Again: "Supposing an infidel who believes a God, and that he will reward and punish him, in *this world*, but does not believe a future state, be examined on his oath, as I think *he may*, and, on the other side, to contradict him, a *Christian* be examined, who believes a future state, and that he shall be punished in the next world, as well as in this, if he does not swear the truth, I think the same credit ought not to be given to the infidel as to the *Christian*, because he is plainly not under the same obligation." *Willes' Rep.* 550.

'From the remarks of the judges it is apparent, that they concurred in the opinion actually given by Ch. J. *Willes*, and quite certain that they did not contradict him. "If my Lord *Coke*," said the Chief Baron, "had, by an infidel, meant a professed atheist, I should have been of opinion, that he could not be a witness." Again: "As to the *Gentoo* religion, it will appear from the best testimonies, that persons of this religion do believe in God as the creator and governor of the world." 1 *Atk.* 40. "I agree entirely," said Ch. J. *Lee*, "with Ch. J. *Willes* and Ch. Baron *Parker*, that where it is returned by the certificate, that the witness is *of a religion*, it is sufficient; for the foundation of all religion is the belief of a God." 1 *Atk.* 46. The Lord Chancellor concurred with the judges, and said: "The rule is, that all persons who believe a God, are capable of an oath." 1 *Atk.* 20. Again: "My intention was to be certified, whether these people believed the being of a God and his providence." "The first author I shall mention is Bishop *Saunderson*, *De Jurisjuramenti Obligatione. Jurisjuramentum*, saith he, *est affirmatio religiosa.* All that is necessary to an oath, is an appeal to a Supreme Being, as thinking him the rewarder of truth and avenger of falsehood." 1 *Atk.* 48.

'The latest *English* writer on this subject, upon a review of all the cases, concludes, by saying: "It seems sufficient, if he [the witness] believes in a God, who will reward or punish him in this world." *Saund. on Plead. & Ev.* 940.

'Such is the basis of the modern doctrine, that a belief of *future* rewards and punishments is essential to the competency of a witness! But, if the foundation fail, where is the superstructure?

'In *Curtiss* v. *Strong*, 4 *Day* 51, it was correctly decided, that a person who did not believe in the obligation of an oath, was not a competent witness. So in *Jackson* v. *Gridley*, 18 *Johns. Rep.* 98, the supreme court of *New York*, with perfect propriety, rejected the testimony of an atheist; and so did Judge *Story* in *Wakefield* v. *Ross*, cited by Judge *Daggett*. But if these learned judges had contented themselves with deciding the cases before them, they would have been as silent as Lord *Hardwicke* and his advisers respecting a belief in the administration of justice in a future world. But zeal to establish a favorite dogma seems to have led the mind of a great and learned judge into an error, not only with respect to the *English* law, but with respect to the language of an *English* judge. "By the law of *England*," says Ch. J. *Spencer*, "which has been adopted in this state, it is fully and clearly settled, that infidels who do not believe in a God, or if they do, do not think that he will either reward or punish them in the world to come, cannot be witnesses in any case, nor under any circumstances, because an oath cannot possibly be any tie or obligation upon them." 18 *Johns. Rep.* 103. This certainly is

not the language of the court in *Omychund* v. *Barker*, but is the precise opinion of Ch. J. *Willes*, as reported by him, omitting "this world or the next," and inserting "the world to come." "Infidels," says *Buller*, "cannot be witnesses,—*i. e.* such as profess no religion that can bind their consciences to speak the truth; but when any person professes a religion that will be a tie upon him, he shall be admitted as a witness." *Bul. N. P.* 292. And *Wooddeson* says: "The case of men wholly without religion, (if any such there be) may justly be thought a reasonable and lawful objection to bearing testimony in any cause or trial whatsoever." 3 *Wooddes.* 281, 2. Another writer says: "And in order that persons should be permitted to testify, it is sufficient if they profess a religion and belief in the Deity, which will be a tie upon them to attest the truth." *Esp. Dig.* 726.

'In conformity with these principles, in 1804, at the *Old Bailey*, a native of China, being examined before Baron *Graham*, on an indictment for felony against *Ann Alsley* and another, was sworn according to the form of the courts in China, by holding a saucer in his hand, which he dashed to pieces at the conclusion of the oath, believing, as he stated, that God would cause his body to be cracked as he cracked that saucer, if he did not tell the truth. *Peake's Ev.* 149, n. (ed. 1809.) When and where did this *Pagan* believe, that the vengeance of heaven would overtake *the body* of the perjured witness? Surely, not in the world to come. Notwithstanding the strong opinion expressed by Ch. J. *Spencer*, his *dicta* have been disregarded, by several learned and respectable judges of that and several other states.

'Thus, in *Butts* v. *Swartwood*, 2 *Cowen*, 431, *Southerland*, J. in delivering the opinion of the Supreme Court, said: "The proper test of a witness's competency, on the ground of his religious principles, is, whether he believes in the existence of a God, who will punish him if he swears falsely."

'So, in *Matteson's* case, cited 2 *Cowen*, 433, n., a witness was offered, who did not believe in any future punishment after this life; and *Walworth*, Cir. Judge, now Chancellor, said: "I apprehend the true test of the competency of a witness to be this: has the obligation of an oath any binding tie upon his conscience? Or, does the witness believe in the existence of a God, who will punish his perjury? If he swears falsely, does he believe he will be punished, by an overruling Providence, in *this world*, or the world to come? If he does not believe in the existence of a God; or if he believes in no punishment, except by human laws; no obligation or tie can have any binding force upon his conscience. But if he believes, that he will be punished, by his God, even in *this world*, if he swears falsely, there is a binding tie upon the conscience of the witness, and he must be sworn." This judge fully recognised the opinion of Ch. J. *Willes*, as reported by

himself, and added: "That part of the opinion of Ch. J. *Spencer*, which relates to punishment in another world, was an *obiter dictum*, and wholly unnecessary to decide the case before the court. In this opinion I am supported, by most, if not all, the circuit judges."

'A similar opinion was given, by *Williams*, Cir. Judge, upon the precise question before us, viz. whether a person who believes in a God, and in rewards and punishments in *this life only*, may be a witness. 2 *Cowen*, 573.

'The same opinion upon the same point, was given by Chancellor *Desaussure*, of *South Carolina*, in *Fernandis* & al. v. *Henderson*, in equity, *Union* district, *August* term, 1827, upon a laborious investigation of all the cases on this subject.

'And in the case of *Hunscom* v. *Hunscom*, 15 *Mass. Rep.* 184, the Supreme Court of *Massachusetts* decided, that a person who did not believe in a future state of existence, was a competent witness.

'Finally, there is nothing in the case before the court, to show, that the creed of this witness is materially variant from that of a considerable class of *Universalists*, who believe in the existence of a God, the authenticity of the Scriptures, and the divinity of the Saviour, but deny that there is any punishment for the wicked after this life. 2 *Cowen*, 432, n.

'A contrary creed on most of these topics was once, by statute, classed among "*capital and other felonies*," and rendered its possessor not only incapable of holding an office, but of suing or defending in a court of justice. But this statute has been repealed, because it was repugnant to the constitution. If the legislature cannot disfranchise a citizen, on account of his religious sentiments, *a fortiori* a court of justice cannot, for the same cause, deprive him of the power of vindicating his rights, by his own testimony, in "due course of law." If the principle now sanctioned, by this court, be carried into full effect, the most attrocious crimes may be committed with impunity, unless perpetrated in the presence of an *orthodox* witness. Vid. *Const. Conn. art.* 1. *Stat. tit.* 16, *c.* 1, (ed. 1808,) *lib.* 2, *p.* 425.

'2. The remaining questions are of minor consideration; but they must be disposed of. It is a well settled rule, that a witness cannot be cross-examined concerning a collateral fact irrelevant to the issue, for the purpose of impeaching his testimony, by contradictory evidence. *Spenceley* q. t. v. *De Willott*, 7 *East*, 108. But if he is so examined, his answer is conclusive.

'It is also a rule, that a witness cannot be examined concerning any fact, which tends to degrade or disgrace him. 2 *Stark Ev.* 139. *Cook's* case, 1 *Salk.* 153. *Northrop* v. *Hatch*, 6 *Conn. Rep.* 361. The issue in the case before us, is, usury or not. The evidence in question neither proved nor disproved it. The inquiry certainly tended to disgrace the witness; but the answer

ought not to be drawn from him; for, to be suspected of harboring such vindictive feelings towards another as would induce a commission of perjury for the sake of revenge, is certainly a disgrace. *Peake's Ev.* 136. *Rex.* v. *Lewis & al.* 4 *Esp. Rep.* 225. *McBride* v. *McBride*, 4 *Esp. Rep.* 242.

'But the practice on this subject seems not to be well settled. *Peake's Ev.* 130. 2 *Stark. Ev.* 139. In my opinion, the rule is, or ought to be, the same as in proving a witness interested, viz. by examining him on the *voir dire*, or proving his interest by other testimony, but not by both. The election of one mode precludes the other. The reason is the same in both cases. "It is certainly unreasonable," said the court, in *Butler* v. *Butler*, 3 *Day*, 204, "that the party should be permitted to sport with the conscience of the witness, when he has other proof of his interest." *Stebbins* v. *Sackett*, 5 *Conn. Rep.* 150. *Chance* v. *Hine*, 6 *Conn. Rep.* 231.

'3. The authorities which admit witnesses of the faith in question, seem to take it for granted, that their incredibility is as their infidelity; and that the ratio must be settled by the jury; but they furnish no rule to ascertain the effect of speculative opinions upon the consciences of witnesses. By what standard is their testimony to be weighed? The jury have none but their own sectarian prejudices. What confidence has a *Christian* in the testimony of a *Mahometan*, who believes that paradise is his inevitable portion? What credit will be given, by a *Protestant*, to the testimony of a *Catholic* with an indulgence in his pocket? Or what would be the fate of a *Free-Mason*, accused and tried by *Anti-Masons*, and *vice versa*? Let the history of parties and persecutions, from the days of *Mather's Magnalia* to our own times, answer these questions.

'The moral character of a witness is the only safe criterion; and, upon this topic, I adopt the sentiment and language of the late Chief Justice: "It may often be difficult to ascertain what are the speculative opinions of men, and how far they influence their conduct. In the conflict of parties, both religious and political, misrepresentations will often take place; and it will commonly be safer to rely on *the general character for truth*, which a man has acquired, by his own conduct in society, than on his *mere opinions*." *Swift's Ev.* 50.'(*a*)

In the case of Peck *v.* Botsford, p. 172, of Mr. Day's seventh

(*a*) 'A new trial having been granted in this cause, it came on again for trial before the Superior Court, in August, 1828, Daggett, J. presiding. The same witness was offered, and the same objection taken to his testimony. Many witnesses were examined relative to the opinions of the witness as to a future state of rewards and punishments. Judge Daggett was satisfied, in view of the testimony, that he was a believer in future, though not endless punishment. He was, therefore admitted.'

volume, the question comes up, whether the acknowledgment by the personal representatives, of a debt due from their testator, will take it out of the statute of limitations, and the court decides that it has not this effect. Mr. Justice Daggett goes into a full examination of the authorities in giving his opinion. Hosmer, Chief Justice, and Lawrence, J. agreed with him, and the decision is founded on the opinion of those three judges, Mr. Justice Peters dissenting, and Mr. Justice Brainard being absent. Mr. Justice Peters's reasons of dissent are not reported. The decision is in pursuance of the present general *leaning* of the courts in favor of giving effect to the statute, and limiting the exceptions.

The case of Wylie *v.* Lewis, 7 Day, 301, was against an endorser, who endorsed a promissory note in blank, not being himself either payee or endorsee, and being, for any thing that appears in the case, a voluntary endorser. It is alleged by the plaintiff to have been endorsed on the same day on which it was made, and this, as we infer from the statement, was proved, though it is not specifically stated to be so. It appears, however, that no specific consideration for the endorsement was proved. On this endorsement the plaintiff declares that 'on the same day [to wit, the date of the note] the defendant, by his endorsement of said note, for value received of said Wylie, promised and engaged that said Tucker [the maker] then was of ability to pay said note, and should continue to be, and should pay said note according to its tenor; that said Tucker then was, and ever since hath been, a bankrupt,' &c. The court decide that the holder was not authorized to fill up the endorsement with such an agreement; and 'consider the count a novelty in pleading, an *avis rara in terris, nigroque simillima cycno.*' The court does not decide what agreement the holder was authorized to write over the endorsement.

DIGEST OF RECENT DECISIONS.

THIS number contains a digest of the principal cases in
HARRIS & GILL'S REPORTS, Vols. 1 and 2.
DAY'S CONNECTICUT REPORTS, Vol. VII. Part 1.

ACTION.

1. A promise by a debtor to his creditor to pay his debt to a third person, will not enable such person to maintain an action at law, in his own name, for its recovery. *Owings's Ex'rs.* v. *Owings*, 1 Har. & Gill, 484.
2. Where one person pays money to another for the use of a third person, or where a person, having ready money belonging to another, agrees with that other to pay it over to a third person, in both these cases an action may be brought in the names of the persons beneficially interested. *Ib.*
3. A promise to one to pay a sum of money to several other persons in equal portions, where it was not the intention of the contracting parties, that such other persons should receive or recover by law, the entire sum, and then divide it among themselves, if the foundation of an action at all, it will confer a right to maintain a separate action for each part. *Ib.*

See ASSUMPSIT 5, 6.

ADVANCEMENT. See DEVISE, 3, 4, 5.

AGREEMENT. See CONSIDERATION; SHIPPING ARTICLES.

APPRENTICE. See NOTICE AND DEMAND.

ALIEN.

An alien may purchase lands, and hold them against every one, (except the State,) until office found, or until the government shall exercise its authority over them; but by the common law a *feme covert*, being an alien, is not entitled to be endowed, nor to inherit lands.(*a*) *Buchanan* v. *Deshon, et al.* 1 Har. & Gill, 280.

APPEAL.

The setting aside a judgment against the *casual ejector*, on motion of the landlord of the tenant in possession, awarding restitution of the premises, and ordering the action to be tried, is but an interlocutory proceeding, from which an appeal will not lie;

(*a*) By the Maryland Statute of 1813, c. 100, an alien widow, *resident in the United States during her coverture*, is entitled to dower.

and the refusal of the court below to reconsider such proceedings, does not alter the case. *Gover* v. *Cooley*, 1 Har. & Gill, 7.

APPEARANCE. See PRACTICE, 3, 4.

APPRAISER under Statute. See EXECUTION, 2, 3.

ARBITRATION.

1. Arbitrators cannot reserve to themselves the authority to act judicially upon the subject submitted, after their powers are put an end to by making an award; neither can they delegate to another any part of their judicial authority, which is personal to themselves, nor refer to another, the decision of a point on which they find a difficulty to decide themselves, and much less to the parties to the submission, or either of them. *Archer* v. *Williamson*, 2 Har. and Gill, 62.
2. The reservation or delegation in an award of a power over the thing submitted, shows the award not to be final, and consequently void; unless, indeed, it relates only to some merely ministerial act. *Ib.*
3. Where the subject referred to arbitrators was one undivided matter, specifically brought to their notice, and on which they professed to act, and the purpose of the parties was to have a final determination of the whole matter submitted;—an award comprehending a part only of the matter submitted, was held to be void. *Ib.*

ASSIGNMENT. See ACTION.

ASSUMPSIT. See ACTION; DEPOSIT.

AWARD. See ARBITRATION.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. W. drew a promissory note, which did not bear date at any particular place, but was made negotiable at the bank of the plaintiffs; it was in favor of C. R. & Son, or order, and specially endorsed by C. R., the defendant, in their names, to the plaintiffs, whose bank was at Georgetown, in the District of Columbia. The note not being paid at maturity, it was on the day after the third day of grace, presented for payment at the said bank, to an agent of W. appointed for the purpose of attending to the payment or renewal of W's. notes held by the plaintiffs, which being refused, notice of its dishonor was put into the post office at Georgetown, directed to C. R. the defendant, at Baltimore, in the state of Maryland, where he resided. W., when the note became due, resided in Prince George's county, in Maryland. It appeared that it was the custom of all the banks and merchants in the District of Columbia to demand payment of notes on the fourth day after they became due. *Held*, that the defendant was liable on his endorsement to the plaintiffs. *Raborg* v. *Bank of Columbia*, 1 Har. & Gill, 231.

2. In an action on a promissory note, drawn in favor of C. & R. and endorsed by R. in their names, to P., the writ was against R. *as surviving partner of C.*, but the declaration was not. It was proved that C. died before the making of the note. Judgment was rendered against R. without stating as surviving partner. On appeal—Judgment affirmed. *Ib.*
3. A drew a promissory note dated at Georgetown, in the District of Columbia, and there payable sixty days after date, in favor of B, or order, who endorsed it to the plaintiffs, by whom it was discounted. On the first day, after the third day of grace, payment was demanded of this note of A, who not paying it, notice of its dishonor was sent by post to Baltimore, in Maryland, to B, who did not then, nor when he endorsed the note, reside at Georgetown, in the District of Columbia. It appeared that it had been the universal practice of banks and merchants in the District of Columbia, for twenty years, to present negotiable notes due and unpaid, to the drawer for the payment, on the fourth day of grace; that such usage was of public notoriety, and that the demand and notice abovementioned, were in conformity thereto. *Held*, that B's contract was to be considered as made in reference to this usage; that both he and the drawer looked to the place where the money was to be paid, and the contract performed, and must be presumed to have known this usage, and he was, therefore, liable as endorser. *The Bank of Columbia* v. *Fitzhugh*, 1 Har. & Gill, 239.
4. A blank endorsement, by A, of the promissory note of B, payable to C, or order, does not imply a valuable consideration from C to A, and an engagement by A, that B was of ability to pay, and should pay, such note. *Wylie* v. *Lewis*, 7 Con. 301.

See USURY.

BOND.

Where the legislature prescribes the substance of a bond, and it is so drawn as to include every obligation imposed by law, and to afford every defence given to it, it will be sufficient, notwithstanding it may be slightly variant from the literal form set out. Per *Archer*, J. *Waters's Representatives* v. *Riley's Adm'r.* 2 Har. & Gill, 305.

See CORPORATION.

BOOK DEBT.

In an action of book debt, the plaintiff is not a competent witness to prove an acknowledgment and promise of the defendant, to take the case out of the statute of limitations. *Weed* v. *Bishop*, 7 Con. 128.

CASE STATED. See PRACTICE, 1, 2.

CHANCERY.

1. Where funds are in the court of chancery, and a party petitions to have them applied in discharge of his claim, it has long

been the uniform practice of that court in this state, to receive the papers on which the claim is founded as *prima facie* evidence, and the chancellor acts on them accordingly, unless *the testimony is put in issue, and full proof required* by the opposite party. *Maccubbin* v. *Cromwell*, 2 Har. & Gill, 443.

2. Where the remedy at law is gone, chancery will not revive it, in the absence of fraud, accident, or mistake. *Waters's Representatives* v. *Riley's Ad'mr.* 2 Har. & Hill, 305.
3. Where a creditor has a right to resort to the joint and several funds of two debtors for the payment of his claim, the court of chancery has no authority to limit that right, and to decree, that if the funds of one of the debtors shall not be sufficient to discharge one half the debt, the creditor shall not look to the other for the deficiency. *Hoye* v. *Penn*, 2 Har. & Gill, 473.
4. The lands of which G. F. died seized, on the application of his heirs and representatives, were sold under an order of the court of chancery, by a trustee appointed for that purpose, to J. & C. B., and the sale was ratified. The purchasers, being creditors of J. F., one of the heirs, filed a petition setting forth their claim, the death of J. F., that his children, who were minors, resided out of the state, and praying an order of publication against them, and payment of the debt due to them. The petition did not state that the personal estate of J. F. was insufficient to pay his debts. The chancellor, without granting an order of publication, dismissed the petition. On appeal, it was held, that creditors may, by way of petition, instead of pursuing the accustomed course of an original bill, affect funds under the control of the court of chancery upon the same terms that they might by bill; and that notwithstanding the defect in the petition in this case, the chancellor erred in deciding the merits of the petition without publication, or without an answer, and without setting it down for hearing; as the right existed, the petition might have been amended, and the defect cured, if the proceedings had proceeded to a hearing. And to enable the petitioners to subject the funds in question to the payment of debts, they must show, either that no personal fund existed applicable to the extinguishment of their claim, or that they are insufficient for that purpose; and must, in addition, establish their claim in the customary method. *Baltzell* v. *Foss*, 1 Har. & Gill, 504.

See DEVISE, 6; SPECIFIC PERFORMANCE; TRUST AND TRUSTEES, 1.

CHOSE IN ACTION; See ACTION.

COMPETENCY OF WITNESS; See EVIDENCE, 9, 10.

CONSIDERATION.

1. A mere written contract is upon the footing of a parol contract, and requires a consideration to support it *Cook* v. *Bradley*, 7 Con. 57.

2. A subsisting legal obligation to do a thing, is a sufficient consideration for a promise to do that thing. *Ib.*
3. A son of sufficient ability is under no legal obligation to pay for past expenditures, made for the relief of an indigent parent. *Ib.*
4. A moral obligation is available as a consideration for an express promise, in those cases, and in those only, where a prior legal obligation has existed, which by reason of some statute, or stubborn rule of law, cannot now be enforced. *Ib.*
5. Therefore, where A had furnished necessaries to B, who was indigent, and in need of relief, and C, the son of B, who was of sufficient ability, signed and delivered to A a writing in these words: 'This may certify, that the debt now due from my father B, to A, I acknowledge to be for necessaries of life, and of such a nature, that I consider myself hereby obligated to pay A sixty dollars towards said debt now due, provided my father does not settle with A in his life-time;' it was *held*, that this contract was void, for want of consideration, and consequently, that no action could be supported on it. *Ib.*

See FRAUDULENT CONVEYANCE.

CONSTITUTIONAL LAW. See JURISDICTION; SPECIFIC PERFORMANCE.

CONTRACT. See CONSIDERATION; DELIVERY OF CHATTEL.

CORPORATION.

1. To render the vote of an incorporated company valid as the act of the corporation, the meeting at which it was passed must have been warned, in the mode prescribed by the charter or by-laws, or, in the absence of any such provision, by personal notice to the members. *Stow* v. *Wyse*, 7 Con. 217.
2. The general agent of a manufacturing company is not authorized, without a special power, to transfer, by deed, the real estate of the company. *Ib.*
3. A party who has executed a deed, is thereby estopped from disputing not only the deed itself, but every fact which it recites. *Ib.*
4. Therefore, where a person executed a deed in behalf of a manufacturing company, and therein declared, that he was empowered, by a vote of the company, to execute such deed; it was *held*, that he was thereby estopped to deny that he was thus empowered. *Ib.*
5. All persons claiming under and through the party estopped by a deed, are bound by the estoppel. *Ib.*
6. In the trial of an action of *assumpsit* by a chartered company, under the general issue, the plaintiff having given a charter in evidence, by which it appeared that the duration of the company was limited to a period subsequent to the commencement of the suit, yet anterior to the time of trial, the defendant cannot

avail himself of that fact to nonsuit the plaintiff. *Agnew* v. *The Bank of Gettysburg*, 2 Har. & Gill, 479.

7. It seems to have been formerly held, that a corporation aggregate could only act by its common seal; could do nothing without deed; but that doctrine is no where sanctioned as a universal proposition. *Union Bank of Maryland* v. *Ridgely*, 1 Har. & Gill, 324.
8. The acts of corporations may now be evidenced by writing without seal. *Ib.*
9. The assent and acts of corporations, like those of individuals, not reduced to writing, may be inferred from other facts and circumstances, without a violation of any known rule of evidence. *Ib.*
10. A corporation may be bound by the acts of its duly authorized agent, although such acts are not reduced to writing. *Ib.*
11. Where the charter of a bank required its cashier to give bond, with two or more sureties, to the satisfaction of the president and directors, and a bond, executed by the cashier, and others, as his sureties, reciting his appointment as cashier, was found deposited among the archieves and valuable original papers and documents of the bank in an iron chest in the banking house of the corporation, and the cashier had continued to act in that capacity for several years after the date of the bond, without any reappointment. In an action on the bond by the corporation—*Held*, that in the absence of all testimony respecting the execution of the bond, the jury ought to be permitted to infer that it was duly executed and delivered by the defendant and accepted by the plaintiffs, which acceptance necessarily included the approbation of the board of directors, or their satisfaction with the sureties, and was not necessary to be in writing. *Ib.*
12. On the petition of A, B, and others, for liberty to erect a toll bridge across Connecticut River, at a certain place between Enfield and Suffield, showing that a bridge might be erected there, without injury to the boat navigation, provided two locks should be made on the East side of the river, the General Assembly, in 1798, incorporated the petitioners, and granted them liberty to erect a toll bridge, at the place referred to, and to collect from passengers certain rates of toll, also to collect from all persons using said locks thirty-four cents per ton, for the term of one hundred years. The corporators were required, by the charter, to give bonds for the completion of the bridge within a limited time; and it was then provided, that the locks should be completed in six years from the rising of the General Assembly in May, 1799, or, on failure thereof, the grant should be null and void. The grant was accepted by the corporators; and the corporation was organized under

it. On the application of the company, reciting their grant of a bridge, the General Assembly, in May 1805, extended the time for erecting and completing the bridge until the first of June 1808, still requiring them to give bonds to finish the bridge. Upon another application of the company, in May 1806, the time was further extended to three years from that time, with the same rights and subject to the same regulations as were granted and provided originally. Before the expiration of this time, viz. in May 1808, the General Assembly, on the petition of the company, authorized them to make a shore channel, in lieu of the locks provided in their original grant to be erected. In the same act, the General Assemby declared, that the company were not thereby, in any respect, excused or restrained from making locks and canals, at any time during the continuance of their grant, if this provision of a shore channel should be found insufficient for the navigation of the river. At the same session, the General Assembly appointed a committee to examine the bridge, and the locks and canals, or shore channel, thereto annexed, and accept the same, and authorize the proprietors to take toll. In October 1808, the General Assembly, on the petition of the company, stating that a shore channel could not be made but at an enormous expense, and that its utility was very doubtful, appointed another committee to report what, in their opinion, was the best mode of erecting the locks so as to subserve the public interest in relation to the navigation of the river, without sacrificing the rights of the petitioners. In October 1809, that committee made their report to the General Assembly, suggesting the expediency of permitting the postponement of any further proceedings in relation to the navigation of the river, at the place originally designated, until a corporation should appear to undertake the erection of locks both at that place and below the bridge. This report was accepted, by the General Assembly, so far as regarded the facts found by the committee. At the same session, the General Assembly, on the petition of the company, resolved, that the building of the locks be suspended, and the company discharged from the obligation to build the same, until the further order of the General Assembly; at the same time, authorizing the petitioners to take the toll prescribed by their charter, for passing the bridge, that being finished, and having been approved by the committee appointed for that purpose. In May 1824, the General Assembly incorporated The Connecticut River Company, authorizing them to remove obstructions from the channels and bars of said river from Hartford to Springfield, and to lock the falls at Enfield on said river, and to make channels to aid them, and to construct a canal on either bank of said river near said falls, &c. Pro-

vision was made, by the charter of incorporation, for the assessment and payment of damages done to individuals, by the canal or other works of said corporation. The Connecticut River Company accepted their grant; and were collecting materials and were preparing to construct a canal and locks on or near the bank on the west side of Connecticut River passing directly opposite to the place designated for the erection of the locks of the other company, but extending several miles up and down the river. The company first incorporated never gave bonds pursuant to their charter; had never constructed any locks, or other work for improving the navigation of the river; nor would the locks or other works, which they were authorized to construct, benefit the navigation; they had suffered their bridge to go down, and sold the piers; and had suffered their agent to buy up the stock of the company, for sinister purposes. In this state of things, the company incorporated in 1798, brought a bill in chancery for an injunction against the operations of the Connecticut River Company. *Held.*

1st. That the right of constructing locks, granted by the act of 1798, did not expire at the end of six years from May 1799, but was preserved, in conjunction with the right, of erecting a bridge, by the subsequent acts of the General Assembly;

2d. That the failure of the plaintiffs to give the bond directed by the act of 1798, and afterwards by the acts of 1805 and 1806, did not defeat their charter, or cause the right granted by it to cease;

3d. That the right of the plaintiffs to construct locks, had not become extinct, by the surrender;

4th. That it had not been lost, by non-user or misuser;

5th. That the plaintiffs could not be divested of their franchise, on the ground of its inutility;

6th. That the right granted to the plaintiffs, was exclusive, and exhausted the power of the General Assembly in relation to that subject;

7th. That the grant to the defendants, as it interfered with and violated the plaintiffs' right, was void;

8th. That the grant to the defendants was not authorized, on the ground that it provided an indemnity to the plaintiffs;

But 9th. that the construction of locks was required by the General Assembly, and considered by the plaintiffs, as a burden, from which the plaintiffs sought relief, and obtained it, by the act of 1809, suspending the building of such locks, and discharging the plaintiffs from the obligation to build the same, until the further order of the General Assembly; and consequently, that the plaintiffs cannot now exercise the right of erecting locks, without legislative interposition;

10th. That the plaintiffs not being in the possession and enjoyment of any right, which the defendants are attempting to infringe, the court will not decree an injunction. *Enfield Toll Bridge Company* v. *Connecticut River Company*, 7 Con. 28.

CO-TRUSTEE. See TRUSTEE.

DAMAGES.

1. In trespass for the taking of goods, alleged in the declaration to be of a certain value, the damages to be assessed, if the plaintiff recover, so far as they depend on the value of the goods, are to be restricted to the value alleged. *Treat* v. *Barber*, 7 Con. 275.
2. But the circumstances which accompany and give character to a trespass, may always be proved, to enhance the damages beyond the pecuniary loss sustained by the plaintiff. *Ib.*
3. Therefore, where it appeared, in an action of trespass *de bonis asportatis*, that the defendant opened the chest of the plaintiff, containing her wearing apparel, and made use of language in relation thereto, that wounded her feelings; it was *held*, that these circumstances were proper to be considered in assessing the damages. *Ib.*
4. A defendant who purchased a slave at less than her value, and agreed at the time of the sale, not to sell her out of the state, but afterwards sold her to a person out of the state, is to be considered as guilty of a cheat, and responsible in damages therefor to the original owner of the slave. *Price* v. *Read*, 2 Har. & Gill, 291.

See SLANDER.

DECLARATION. See EJECTMENT; CORPORATION.

DEED. See CORPORATION, 4, 5.

DELIVERY OF CHATTEL.

1. Where there is a contract for the delivery of specific articles at a time and place specified, the absence of the promisee at such time and place, does not dispense with such acts on the part of the promisor, as are necessary to vest the property in the promisee. *Smith* v. *Loomis*, 7 Con. 110.
2. The mere fact that the promisor had the articles, at the time and place appointed, ready to be delivered, is not sufficient to vest the property in the promisee. *Ib.*
3. To constitute a good defence to an action on such contract, the articles must be set apart and designated, so as to enable the promisee to distinguish them from others. *Ib.*
4. Therefore, where the defendant in an action on such contract, pleaded, that he had the articles, at the time and place appointed, ready to be delivered, but the plaintiff did not appear to receive them; after verdict for the defendant on such plea, it was *held*, that the matter pleaded constituted no defence; that the defendant should have designated the articles intended

for the plaintiff and set them apart, so as to vest the property in him; and that the defect was not cured by verdict. *Ib.*

DEPOSIT.

1. W. being taken sick at the house of V., deposited in his hands a sum of money, and directed V. to send for a physician, to furnish him with every thing that was necessary, and to apply the money to the payment of the physician's bill, and of any expenses which might be incurred on his account during his sickness. V. did send for a physician, and furnished W. with every necessary and attendance during his sickness, which in a few days ended fatally. On his death, V. paid all the expenses, including the physician's bill. In an action of *assumpsit* brought against V. by W's. administrator, to recover the amount of the deposit; *Held*, that V. was to be allowed for the amount paid to the physician, if it was such as he was entitled to receive, as well as the other expenses. That the fund placed in his hands by W. was to be considered as a special fund, and that in relation to it he was to be looked upon as a trustee or agent of the physician, for whose remuneration it was in part created; but that it would have been otherwise if V. had received the deposit for safe keeping only. *Vandersmith* v. *Washmein's Adm'r.* 1 Har. & Gill, 6.

DEPOSITION. See EVIDENCE, 14, 15, 16.

DEVISE.

Where a testator devised as follows: 'I bequeath unto my grand-daughter E, the following negroes, viz. &c. 'to her and her heirs forever; and in case it should please God, to take my grand-daughter *before she has an issue*, then the said negroes devised, to be an equal division between the rest of my heirs. And it is my will, that neither D. nor J. should ever have any command, or authority, over the negroes devised to my grand-daughter.' And the legatee died without ever having had a child—*Held*, that the limitation over, was a good executory bequest to the heirs of the testator, who were such at the time of his death; and that they were entitled to the property bequeathed to them, as tenants in common. *Dashiell* v. *Dashiell.* 2 Har. & Gill, 127.

2. A testator devised as follows: '*Item.* I give to my beloved wife E. a tract of land purchased of S., whereon I now live, during her natural life, and after her decease to my son R., to him and his heirs forever. *Item.* I give to my sons J. and B. all that tract or parcel of land being part of *C*, to be equally divided between the abovementioned J. and B.; and my son J. to have his first choice of the abovementioned land. *Item.* I also give to my two sons, J. and B., a small tract of land lying on,' &c. 'called *H*, containing seventy acres, to them and their heirs forever. In case either of my sons dieth before they

come of age, then their part or parts of land to be equally divided between the other two abovementioned brothers, or to the survivor of the abovementioned J, R, and B. *Held*, that J. took only an estate for life in the tract of land called *C. Edelen's Lessee* v. *Smoot*, 2 Har. & Gill, 285.

3. Under a devise to the wife of a certain part of the testator's estate, she is not entitled to participate in an advanced portion received by one of the daughters. *Porter* v. *Collins*, 7 Con. 1.
4. But in the distribution of an estate under a will, among children, advanced portions are to be brought into *hotchpot*, and made the subject of distribution according to the provisions of the will. *Ib.*
5. Therefore, where a testator gave to his wife A the use of one third of his estate, during her life; to trustees for the benefit of his daughter B, during her life, one half of his estate not otherwise disposed of, deducting therefrom the amount of an advanced portion which she had received; and to his daughter C the remainder of his estate; it was *held*, 1. that A was entitled, in the distribution, to receive only one third part of the estate left by the testator, at his death; 2. that to the residue of such estate was to be added the amount of B's advanced portion, and then B was to receive one half of this sum, less by the amount of her advanced portion, and C was to receive the other half, precisely. *Ib.*
6. A, by his will, directed, that one fourth part of his real estate, appraised according to law, should be retained in the hands of his executors, and that they should pay over annually the interest of that amount to his daughter H, during the minority of her children, and the principal to the children, as soon as they should come to full age. The testator appointed his three sons-in-law, B, C, and D, his executors. C died before the testator, and D never accepted the trust. B accepted the trust, and had an inventory of the estate taken, and a distribution made, one fourth part being set to him as executor. At different times afterwards, he conveyed, in his individual capacity and for his private benefit, the estate so set to him, in distinct parcels, to E, F, and G, who had notice of all the facts. B also became insolvent, and failed to pay the interest to H., or the principal to her children as they came to full age. On a bill in chancery, brought by H, and her children, against B, and his several grantees, seeking satisfaction of their claims from the defendants, or the estate in their hands, it was *held*, 1. that as the executors were to pay a gross sum in money, to be ascertained by an appraisal of the land, an estate *in fee* was given to them; but 2. that this estate in fee was not absolute, but *upon condition* that they should perform the directions of the testator in relation to the plaintiffs; and 3. that it is within

the power of a court of chancery to compel such performance against the defendants; 4. that the plaintiffs had not adequate remedy at law; 5. that there was no misjoinder of parties, plaintiffs, or defendants. *Judd* v. *Bushnell*, 7 Con. 205.

See EXECUTORY DEVISE; HUSBAND AND WIFE, 4; WILL, 1, 2, 3, 4.

DOWER.

1. Where the owner of a tract of land sold it, executed a bond for conveying the same to the purchaser, received a considerable part of the purchase money, afterwards married, and then conveyed the land to the purchaser, and took a mortgage of the same premises from him, to secure a balance of the purchase money then unpaid, a right of dower at law vested in his wife; though under such circumstances she would not be dowable in equity. *Dimond's Adm'x.* v. *Billingslea*, 2 Har. & Gill, 264.
2. A widow has a right to ask in equity part of a fund in lieu of dower, where that fund has been produced by the sale of her husband's lands, which were subject to her dower, and increased, by being sold clear of that incumbrance with her approbation; and where she has assigned such a claim, her assignee will succeed to her rights. *Maccubbin* v. *Cromwell*, 2 Har. & Gill, 443.

EJECTMENT.

There must be such a description of the land claimed in an action of ejectment, as will enable the sheriff to deliver possession after judgment. *Fenwick* v. *Floyd's Lessee*, 1 Har. & Gill, 172.

See APPEAL.

ENDORSEMENT. See BILLS OF EXCHANGE, &c. 4.

EQUITY. See CHANCERY, 4.

ESCROW. See PLEADING, 15, 16.

ESTOPPEL. See CORPORATION, 4. 5.

EVIDENCE.

1. Where a witness stated that he was well acquainted with the family of two brothers, and was at their father's and heard on the day of their burial, and at their funeral, from their father and sisters, that one of them, (naming him,) died a few hours before the other; and, although at the time of the examination of the witness, one of the sisters was alive, and within the reach of the process of the court, the father and other sister being dead—*Held*, that such evidence of the times of the respective deaths of the said brothers, so far as the information of the witness was derived from the deceased father and sister, was admissible to prove which of the two brothers survived the other. *Raborg's Adm'x.* v. *Hammond's Adm'r.* 2 Har. & Gill, 42.
2. The record of an action of *assumpsit* between the same parties, in which the jury assessed the plaintiff's damages at a less sum

than $ 50, and the court, for want of jurisdiction, gave judgment for the defendant, (treating the verdict as a nullity,) is no evidence of a former recovery of the debt due from the defendant to the plaintiff; nor can it operate as a bar in another action on the same cause of action. *Offutt's Adm'rs.* v. *Offutt*, 2 Har. & Gill, 178.

3. It is a general and familiar principle, that there exists in every sale of personal property an implied warranty of title; and that the vendor cannot be a witness to sustain the title of the vendee. *Mockbee's Adm'r.* v. *Garner*, 2 Har. & Gill, 176.
4. Executors, administrators, and other trustees, are exceptions to that rule, and a sale by them does not imply a warranty of title. *Ib.*
5. A letter of a deceased surveyor, with his plot and explanations of the lands in dispute, made up chiefly of his statements and opinions, which did not give his declarations of former runnings of the lands which he performed as surveyor, or to which he in any way was a witness, nor describe with sufficient precision to be understood, the place and extent of the lines of the tracts of land therein referred to, and in the survey of which he acted as an assistant, are not competent evidence to go to the jury. *Stoddert's Lessee* v. *Manning*, 2 Har. & Gill, 147.
6. A witness cannot excuse himself from giving testimony, on the ground that he is called to swear against his interest. *Ib.*
7. Where a plaintiff averred, 'that H. then and from thence hitherto,' (that is, until the date of issuing the writ,) was his apprentice, his statement is falsified by proof, which showed that the contract of apprenticeship, had ended prior to that time; and those words being of the very substance of the contract declared on, could not be rejected as surplusage; and, therefore he could not recover. *Ferguson* v. *Tucker*, 2 Har. & Gill, 182.
8. Where an apprentice absconded on the *first* of the month, and notice of that fact, with a caution against harboring him, was published in a daily paper on the *fourth*, which paper was taken by the defendant, in whose employment the apprentice had been from the *first*, and afterwards continued; and the defendant afterwards being applied to by the master, for payment of his apprentice's services, was informed that he was an apprentice of the plaintiff, refused to pay for his services, and expressed no surprise at such information, nor pretended that he had been previously ignorant of his so being an apprentice—such proof is proper to be weighed by a jury, who are to determine whether the defendant knew after the *fourth*, that the person in his employment was an apprentice; and the court ought not in such case to say that the jury could not find such knowledge. *Ib.*

9. Information received by one partner (the witness) from his copartner, of the price of merchandise purchased by him at Z. for which the witness knew that his house at B. where he resided, paid at the price mentioned, is but hearsay evidence of the price of such merchandise at Z. *Williamson* v. *Dillon*, 1 Har. & Gill, 444.
10. Where a witness declared 'that he was called on in the spring of the year 1817, to state the difference usually allowed on the sale of flour between fine, superfine, &c. that he *then* stated the difference was as follows,' &c. *Held*, that this might be true, and yet the witness have no knowledge of the facts—his declaration being, that he made the statement, and not that it was true. Such testimony is not admissible evidence. *Ib.*
11. It is a general rule of evidence, that in a suit brought by an incorporated bank, one who is a stockholder and interested in the event of the suit, is not a competent witness in behalf of the institution. But this rule is not without exception; as where an interested corporator is called upon to prove himself either to be or to have been the depositary of the muniments of his corporation. *Union Bank of Maryland* v. *Ridgeley*, 1 Har. & Gill, 324.
12. An interested corporator, however, is not a compent witness to prove that a book continued to be one of the muniments of his corporation after he had ceased to be the depositary thereof. *Ib.*
13. The adoption of a code of by-laws by a corporation need not necessarily be by writing, but may be proved as well by the acts and uniform course of proceedings of such corporation, as by an entry or memorandum in writing. *Ib.*
14. If it is discovered during any part of a trial, that a witness is interested, his evidence shall be struck out. *Morton* v. *Beall's Adm'r.* 2 Har. & Gill, 136.
15. Where the interest of a witness is discovered after his examination, it is the duty of the court to direct the jury to discard his evidence, although both parties may have informed the court, that the testimony was closed, and the witnesses had been discharged; the party making the objection having omitted to disclose it at an earlier period, with no intention of ensnaring his adversary. *Ib.*
16. A deposition or oral testimony, stating the contents of a paper, which can be shown to the court, but which is not produced, is inadmissible. *Mather* v. *Danforth*, 7 Con. 304.
17. Therefore, where the plaintiff, in an action for money had and received, to prove his title to the money demanded, offered a deposition, in which the deponent referred directly, and in terms, to a bill of lading, as the evidence of the shipment of

the money to the plaintiff; but such bill of lading was not produced, or shown to be lost, or beyond the plaintiff's reach; it was *held*, that such deposition was inadmissible. *Ib.*

18. And it did not render such deposition the less exceptionable, that the court, at the instance of the plaintiff, subsequently instructed the jury, that what was contained in it in relation to the bill of lading should not be considered as evidence; because this would make the deponent say, of his own knowledge, what, by the terms of the deposition, he might have known only by the bill of lading; and besides, as he had sworn to the existence of a paper, from which he gained his information, the court had now proof of a fact, sufficient, of itself, to exclude the testimony; and it could not, therefore, be proper to admit illegal testimony, by excluding testimony which rendered it such. *Ib.*

19. The declarations of a person in the occupation of land, under an absolute deed from the former owner, are not admissible, in a suit *inter alias partes*, to show the nature and extent of such occupation. *The Inhabitants of the town of Reading* v. *The Inhabitants of the town of Weston*, 7 Con. 143.

20. In civil proceedings, unless the character of the party be directly put in issue, by the proceeding itself, evidence of his general character is inadmissible. *Humphrey* v. *Humphrey*, 7 Conn. 116.

21. And it makes no difference, whether such evidence is offered to rebut positive or presumptive testimony. *Ib.*

22. Therefore, where the respondent, on the hearing of a petition for a divorce, on the ground of adultery, for the purpose of rebutting presumptive testimony, adduced by the petitioner, to prove that crime, offered evidence that her general character was fair; it was *held*, that such evidence was inadmissible. *Ib.*

23. In an action to recover the value of work and labor performed in the defendant's service, he cannot give in evidence the declarations of the mother of the plaintiff, that she had sent the plaintiff to serve the defendant under an agreement between her and the defendant, that the plaintiff was to serve for his victuals and clothes; although the plaintiff, at the time he went into the service of the defendant, was a minor, and his mother was his only parent then alive. *Berry* v. *Waring*, 2 Har. & Gill, 103.

24. The fact that a witness had once seen an entry in a Bible belonging to the plaintiff's father, in his hand-writing, of the time of the birth of the plaintiff, (which Bible was not produced, nor its absence accounted for at the trial,) does not preclude such witness from stating his recollection of the time of the plaintiff's birth, independently of the entry. *Ib.*

25. In an action against one partner, by the payee of a partner-

ship note, to recover the amount thereof, the other partner is a competent witness for the defendant, to prove that the consideration of the note was for the exclusive benefit of the witness, given to secure a debt due by him on his own account; and that when he signed the note he informed the plaintiff that he was not authorized to sign the name of the defendant. *Robertson* v. *Mills*, 2 Har. & Gill, 98.

See MORTGAGE, 3, 4; TRIAL; BOOK DEBT.

EXECUTION.

1. A sheriff's return to a *fieri facias*, which states a levy on 'part of a tract of land called,' &c. is void for uncertainty, cannot be set up by matter *dehors* the return, and a sale under it passes no title. *Thomas's Lessee* v. *Turvey*, 1 Har. & Gil, 435.
2. But a levy on 'a tract of land called,' &c. under a *fieri facias* against a person who was seized of a part of such tract, and a sale under it, will pass his interest to the purchaser. *Ib.*
3. Joint property in the possession of one of the owners, may be seized and sold under a *fieri facias* against him only; and the purchaser's right will be complete to the extent of the interest of him against whom the execution issued, and he may hold accordingly. *M'Elderry* v *Flannagan*, 1 Har. & Gill, 308.
4. Where F., a ship-carpenter, contracted with C. to build a vessel for him, which C. was to pay for as the work advanced, and furnish all the materials and labor, except what appertained to the ship-carpenter's work, the vessel being in the possession of F., not entirely paid for, and nearly finished; *Held*, that F. had an interest in the vessel to the extent of the carpenter's work *not paid for*, liable to seizure and sale on process for the recovery of debts. *Ib.*
5. The acquisition of title by execution being a proceeding *in invitum*, the requisites of which are prescribed by positive law, in derogation of the common law, a strict compliance with these requisites is indispensable to a transfer of title. *Mitchell* v. *Kirtland*, 7 Con. 229.
6. An appraiser of the land levied on, in such proceeding, between whom and one of the parties the relation of landlord and tenant subsists, is not *indifferent*, within the meaning of the statute. *Ib.*
7. And if the appraiser, in such case, be agreed on and appointed by the parties, with knowledge of his situation, it will make no difference; for the agreement of the parties cannot alter the law. *Ib.*
8. A term of the superior court is considered in law as being held on the day when it begins to be held, and must be so described. *Cutler* v. *Wadsworth*, 7 Con. 6.
9. An execution, unsupported by the judgment which it counts on, is void; and the officer to whom it is committed, is under no legal obligation to execute it. *Ib.*

10. Therefore, where an execution counted on a judgment rendered by the superior court, on the fourth *Tuesday* of *February;* and the record showed a judgment, rendered by that court, on the second *Tuesday* of *February;* and it appeared that the court commenced its session on the second *Tuesday*, which was the day prescribed by law for the holding of the court, and continued in session without interruption until after the fourth *Tuesday*, and that the judgment was in fact rendered on an intermediate day between the second and fourth *Tuesday;* it was *held*, that such execution was void, and that the officer to whom it was committed, was not bound to execute it. *Ib.*
11. An application for a new execution, on the ground that a former execution has been returned satisfied, by a levy on land which was defective, and by which no title was acquired, is substantially a *scire facias* or action of debt, and must be proceeded with accordingly. *Williams* v. *Cable*, 7 Con. 119.

EXECUTORS AND ADMINISTRATORS.

1. Where letters testamentary or of administration have been revoked pending an action against the executor or administrator, such delinquent executor or administrator is deprived of no honest defence which should be made to the action. *The State, use of Blackistone* v. *Blackistone*, 2 Har. & Gill, 139.
2. If no assets have come to his hands, if he has administered them, if preferred creditors will consume the whole estate, if he has satisfied the claim, or on any ground it be unfounded in law or fact, it may be pleaded in bar of the action. *Ib.*
3. If there be other debts outstanding, or paid, or if the property of the deceased has, under an order of the orphans' court, been delivered over to a new administrator, it may be pleaded, not as a complete bar to any recovery, but it will confine the plaintiff to nominal damages, or such other damages as a court and jury, under all the circumstances of the case, shall think him entitled to recover; but if no new administrator has been appointed, judgment should be rendered as if the letters testamentary or of administration had not been revoked. *Ib.*
4. An executor empowered to sell lands by last will, having sold them in 1814, and put the purchaser in possession, it was his duty, if the sale was for *cash*, payment being refused, to have sued; if on *credit*, he ought, within a reasonable time, to have obtained bond and security for the purchase money; and at all events should have retained possession of the land until the necessary security was given. Omitting to sue at law until 1819, he was *prima facie* guilty of gross negligence, and responsible, as a trustee would be, for the proceeds of the lands from the time of the sale, deducting his reasonable expenses and commissions. *Hurtt* v. *Fisher*, 1 Har. & Gill, 88.

See DEPOSIT; EVIDENCE, 3, 4; LIMITATION, 9; WARRANTY, 1, 2.

EXECUTORY DEVISE.

1. Executory devises and bequests are valid, where they must take effect, if at all, within a life or lives in being, and twenty-one years and the fraction of a year afterwards. *Dashiell* v. *Dashiell*, 2 Har. & Gill, 127.
2. In case of a bequest of personal property, the courts are always studiously anxious to effectuate the intention of the testator, and will lay hold of the smallest circumstance to limit a failure of issue, (where such property is devised upon that contingency,) to the death of the first taker, so as to make the limitation over, good as an executory devise. *Ib.*

See DEVISE, 1.

FEME COVERT. See HUSBAND AND WIFE, 5.

FORECLOSURE. See MORTGAGE.

FORMS prescribed by Statute. See BOND.

FRANCHISE. See CORPORATION, 12, &c.

FRAUD. See DAMAGES, 4.

FRAUDS, Statute of. See PAROL AGREEMENT.

FRAUDULENT CONVEYANCE.

1. Marriage cannot be given in evidence as the consideration of a deed of bargain and sale expressed to be made for a money consideration. *Betts* v. *The Union Bank of Maryland*, 1 Har. & Gill, 175.
2. The greatest extent to which the authorities have gone, has been to allow an *additional* consideration to be proved, which is *not repugnant* to the one mentioned in the deed; but where a deed is impeached for fraud, the party to whom the fraud is imputed, will not be permitted to prove any other consideration in support of the deed. *Ib.*
3. Ante-nuptial settlements made in consideration of marriage, are good, even though the party be then indebted. *Ib.*

FRAUDULENT SALE. See SALE.

GRANT.

On the application of the proprietors and inhabitants of the town of New Haven, for a patent of confirmation of the lands, both meadow and upland, with their appurtenances, within certain boundaries particularly specified, which they had obtained, by purchase, or otherwise lawfully, of the Indian native proprietors, and whereof they had stood seized, and in quiet possession, for many years then past without interruption, the General Assembly of the colony of Connecticut, in 1685, for a more full confirmation of the premises unto the said proprietors and inhabitants of the town of New Haven, in their rightful possession and enjoyment of the same, gave, granted, ratified, and confirmed unto them, their heirs, successors, and assigns, the premises so butted and bounded, together with all the meadows, pastures, swamps, upland and arable land, woods,

islands, ponds, ways, waters, watercourses, havens, ports, rivers, fishings, huntings, fowlings, mines, minerals, quarries, precious stones, on or within the premises, and all other commodities, privileges, franchises, and hereditaments whatsoever thereunto belonging, or in anywise appertaining to any part or parcel thereof. Within the boundaries of the premises was Dragon river, an arm of the sea, where the tide ebbs and flows, and navigable for large vessels. *Held*, 1. That this act of the General Assembly was not only a confirmation, but a grant, of title; but 2. that the soil between high and low water mark of Dragon river, was not thereby granted. *Inhabitants of the Town of East Haven* v. *Hemingway*, 7 Con. 186.

GUARANTY.

F. applied to S. & T. for a loan of money, which they refused, without security. He then brought, addressed to them, the following letter from C. 'Mr. F. tells me that he is about to loan from you five hundred dollars, and wishes me to state that I will become his eventual security for the payment. This I am willing to do, as I believe Mr. F. will be very punctual, having found him so on similar occasions.' On the delivery of this letter to S. & T. they said they would have nothing to do with C. in money transactions. The letter being left with them, and their refusal not communicated to C., in a day or two after, F. again applied to them for money; they lent him $300, nothing being then said about the guaranty; they however retained it, placed it among evidences of debts due to them, and took from F. his note for the amount of the loan; *Held*, that there was evidence from which the jury might infer that S. & T. accepted C's. letter as a guaranty for their loan to F. and that the said letter was a conclusive guaranty for the eventual repayment of a loan not exceeding the sum mentioned in it. *Caton* v. *Shaw & Tiffany*, 2 Har. & Gill, 13.

HEARSAY. See EVIDENCE, 1.

HIGHWAY.

1. The limits of a highway must be defined with reasonable certainty. *Beardslee* v. *French*, 7 Con. 125.
2. Therefore, where a survey designated only the line of a highway, without specifying its width; it was *held*, that such survey was inadmissible to prove the existence of a highway. *Ib.*
3. The non-user of a highway, for many years, is *prima facie* evidence of a release of the public right to the owner of the soil. *Ib.*
4. Therefore, where bars across a highway had been kept up, by the owner of the soil, for about ninety years, it was held, that evidence of this fact was admissible to prove an extinguishment of the public right. *Ib.*
5. If a person, in removing obstructions from a highway, wan-

tonly and unnecessarily destroy the property of another, he is liable in trespass. *Ib.*

HUSBAND AND WIFE.

1. The lands of an intestate, being incapable of a beneficial division, on the petition of his heirs, and by the order of the court of chancery, were sold, and the sale ratified. After this ratification, and as to part of the proceeds prior to any order or decree adjudging who was entitled thereto, one of the heirs, a married woman, died. Her husband, who survived her, and who was a party to the petition, also died. *Held*, that the husband's representatives were not entitled to the wife's portion of that part of the proceeds of her father's estate, respecting which no order or decree of distribution had been passed at the time of the husband's death, but that it belonged to her personal representatives. *Leadenham's Ex'r.* v. *Nicholson*, 1 Har. & Gill, 267.
2. The representatives of a husband who survived his wife, are entitled to the *choses in action* of the wife, where the husband had either reduced them into possession, or obtained judgment for them at law or in equity, either in his own favor or that of himself and wife. *Ib.*
3. An agreement between a man and his intended wife, in consideration of marriage, (which had none of the legal attributes of a marriage settlement, so as to overreach the claims of creditors,) to secure to her, for her own use, an annuity for life, may, after the marriage, and the death of the husband, be enforced by the wife against his representatives; and his estate being insufficient to pay his debts, she will be treated as a general creditor to the extent of her claims under the agreement, and her dividend so invested as to produce as much of the annuity as practicable. But where the widow having claimed payment only of her annuity from the time of the death of her husband, her dividend was estimated upon its arrearages, from that time to the sale of the estate, and the interest which had accrued thereon. *Buchanan* v. *Deshon*, 1 Har. & Gill, 280.
4. A wife being entitled to the proceeds of lands devised to be sold, dying after a sale of them, her husband surviving is entitled to the proceeds thereof. *Hurtt* v. *Fisher*, 1 Har. & Gill, 88.
5. A and B his wife, conveyed her land to C, the daughter of B, and wife of D, by deed of gift; after which A was committed to prison, on an execution in favor of E, and held in close confinement. With a view to obtain his liberation, C agreed with her husband D, that if he would assume the debt to E, by giving his note for the amount, she would pay it from the avails of the land so conveyed to her. D gave his note accordingly, and A was liberated from imprisonment. Immediately after-

wards, C died; and D, having paid the note to E, exhibited to the court of probate his claim for the money so paid, against the estate of C. *Held*, 1. that the agreement between C and D, having been executed on one part, was not within the statute of frauds and perjuries, and might be proved by parol; 2. that if D. had an equitable claim, which a court of chancery, on suitable process, with the parties in interest before it, could enforce, it was not competent to a court of probate to allow it; but 3. that the agreement, having been made by a feme covert with her husband, without benefit to her, was void, and could not be enforced anywhere. *Watrous* v. *Chalker*, 7 Con. 224.

IMPROVEMENTS.

If a man has acted fraudulently, and is conscious of a defect in his title to an estate, and with that conviction on his mind, expends a sum of money in improvements, he is not entitled to avail himself of the value of such improvements, on his title being declared void. *Strike* v. *M'Donald & Son*, 2 Har. & Gill, 191.

INSURANCE against fire.

1. The strictness and nicety which have been wisely adopted in the trial of questions arising on policies of marine insurance, are not, to their full extent, applicable to the policies of fire insurance associations, formed for the individual accommodation and security of its members—the risk being assumed on the knowledge acquired by an actual examination made by the officers of the company, and not on the representations coming from the assured. *Jolly's Adm'rs.* v. *Baltimore Equitable Society*, 1 Har. & Gill, 295.
2. Such an association cannot be viewed as involving in it a mutual relinquishment of the right of exercising those ordinary necessary acts of ownership over their houses, and which have been usually exercised by the owners of such property; and, consequently, the insured is authorized to make any necessary repairs in the mode commonly pursued on such occasions. But if by gross negligence or misconduct of the workmen employed, a loss by fire ensue; or if alterations be made in the subject insured materially enhancing the risk, and not necessary to the enjoyment of the premises insured; or which, according to usage and custom, were not the result of the exercise of such ordinary acts of ownership, as in the understanding of the parties were conceded to the insured at the time of the insurance, and a loss by fire is therefore produced, then are the underwriters released from all liability to indemnify for such loss. *Ib.*

JUDGMENT. See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.

JOINDER of parties. See PARTIES.

JURISDICTION.

1. The state courts have no jurisdiction of suits arising on the penal laws of the United States; nor can such jurisdiction be conferred upon them, by an act of congress. *Ely* v. *Peck*, 7 Con. 239.
2. Therefore, an action by the owner of a vessel, against a seaman, on the act of congress for the government and regulation of seamen in the merchants' service, to recover the penalty inflicted by that act for desertion, cannot be sustained in the courts of a state. *Ib.*
3. An action to recover the penalty inflicted by the 19th section of the consolidated act regarding the post-office department, approved the 3d of March, 1825, for an alleged violation of that act, cannot be sustained in the courts of a state. *Davison* v. *Champlin*, 7 Con. 244.
4. And if such action be brought in such court, the defendant may take advantage of the want of jurisdiction, by motion in arrest for the insufficiency of the declaration, after trial on the general issue. *Ib.*

JURY. See TRIAL.

LAW AND FACTS. See PRACTICE, 1, 2.

LEGACY. See EXECUTORY DEVISE.

LIBEL.

1. Where a writing in the form of a letter, addressed to the wife of another man, contained words, importing, that she had acted libidinously towards the writer, had invited him to an adulterous intercourse with her, and had sought opportunities to effect it; which writing was composed and sent to her, with intent to insult and abuse her, to debauch her affections and alienate them from her husband, to entice her to commit adultery, and to bring her into disgrace and contempt; it was *held*, that such writing was libellous. *State of Connecticut* v. *Avery*, 7 Con. 266.
2. The sending of a letter containing such language, to the person to whom it is addressed, is an offence of a public nature, which may be the subject of an information. *Ib.*
3. The solicitation of another to commit adultery, is a high crime and misdemeanor, cognizable by the superior court. *Ib.*

LIMITATIONS.

1. As to what promises or acknowledgments will take a case out of the act of limitations—*Held*, 1. That the promise need not be absolute, but a conditional promise is sufficient; and in such case it is incumbent on the plaintiff to show at the trial, either a performance of the condition, or a readiness to perform it. *Oliver* v. *Gray*, 1 Har. & Gill, 204.
2. That the suit is to be brought on the original cause of action, and not on the new promise or acknowledgment, which only restores the remedy. *Ib.*

3. That the acknowledgment must be of a present subsisting debt, unaccompanied by any qualification or declarations, which, if true, would exempt a defendant from a moral obligation to pay. *Ib.*
4. That an unqualified acknowledgment, &c. with no other excuse for not paying than a reliance on the bar created by the act of limitations is sufficient to take the case out of the act. *Ib.*
5. An admission that the sum claimed has not been paid, is not sufficient to take a case out of the act of limitations, without some further admission, or other proof that the debt once existed. *Ib.*
6. The acknowledgment need not be made to the plaintiff himself, but may be made to anybody else. *Ib.*
7. Every acknowledgment which is offered to take a case out of the act of limitations, must be taken all together; and no evidence can be received, to turn a denial of the existence of a debt into an acknowledgment of a subsisting liability, by proving that the party making the admission was mistaken in supposing the debt to have been paid. *Ib.*
8. A clause in a will directing all the just debts of the testator to be paid, will not save a debt barred by the statute of limitations from the operation of that statute. *Peck* v. *Botsford*, 7 Con. 172.
9. An acknowledgment, by a personal representative of a deceased person, that a demand against the estate of the deceased, barred by the statute of limitations, is due, will not take the case out of the statute. *Ib.*

See Book Debt.

MANUMISSION.

Slaves manumitted by last will, where the testator's *personal* estate, exclusive of the slaves, is not sufficient to pay his debts, are not entitled to freedom. *Negroe George*, v. *Corse's Adm'r.* 2 Har. & Gill, 1.

MASTER AND SERVANT.

1. A master is answerable for all injuries arising from the negligence or unskilfulness of his servant in executing duties assigned to him; but when he abandons his duty, and wilfully becomes a wrong doer, the master is exempt from all responsibility for such wrongful acts. *Brown* v. *Purviance*, 2 Har. & Gill, 316.
2. B, The harbor-master of the city of Baltimore, acting in obedience to a lawful order of the board of health of that city, ordered a vessel, belonging to the plaintiff, to be removed from a wharf, and moored in the stream. He employed C. to perform that duty, who having finished it, with his associates, hired for the purpose aforesaid, returned from the vessel to the shore, in a boat belonging to her, which they there abandoned, and which

was thus lost to the plaintiff. The boat was demanded of B. by the plaintiff, and he having omitted to return her, an action of trover was brought against him—*Held*, that from the time the vessel was moored in the stream, C. ceased to be B's. agent, and that for no acts of his or their consequences after that period was he responsible. *Ib.*

MINOR. See EVIDENCE, 23, 24.

MONEY COUNTS. See TOBACCO.

MORTGAGE.

1. Where an absolute deed of land was executed and delivered to the grantee, on the premises; and the grantor and grantee afterwards occupied the premises together; it was held, that the execution and delivery of the deed were equivalent to livery of seizin, and gave the grantee possession; and the subsequent occupation of the grantor must have been under the grantee, in whom the legal estate was vested. *Inhabitants of the Town of Reading* v. *Inhabitants of the Town of Weston*, 7 Con. 143.
2. Where A, immediately after the execution and delivery of a deed to her from B, gave back to B a writing, binding herself, if B should, within three years, bring her a certain sum (the consideration of the deed) with interest, to deliver up to B such deed, but if B should fail to bring the money, by the time limited, he was to forfeit all claim to such deed; it was *held*, that this was not a mortgage, as there was no debt to be secured, but a mere contract to reconvey, on certain terms. *Ib.*
3. On a bill of foreclosure, the title of the mortgagee cannot be investigated. *Palmer* v. *Mead*, 7 Con. 149.
4. Therefore, where the plaintiff in a bill of foreclosure having proved the execution of the mortgage deed and of the note which it was given to secure, the defendants who, as creditors of the mortgagor, had attached the mortgaged premises, by way of defence against the bill, offered evidence to show, that such deed was given to defraud creditors in violation of the statute against fraudulent conveyances; it was *held*, that such evidence was inadmissible. *Ib.*

NAVIGABLE WATERS. See GRANT.

NOTICE AND DEMAND.

1. Although at the time of hiring an apprentice, a defendant may have been ignorant of the apprenticeship; yet, if after obtaining that information, he continues to harbor him, he is liable in an action at the suit of the master, without any proof of either demand or refusal. *Ferguson* v. *Tucker*, 2 Har. & Gill, 182.
2. As soon as the new master acquires a knowledge of the apprenticeship, he is bound to discharge the apprentice, that he may not hold out to him an inducement not to return to his original master. *Ib.*

OCCUPANCY. See EVIDENCE, 19.

PAROL AGREEMENT.

A parol agreement between a landlord and his tenant, that the latter should surrender the residue of his term in the premises leased, to a purchaser, in consideration of which, the landlord agreed to give up the rent in arrear, is void as being within the statute of frauds, and inadmissible in evidence on an issue joined in an action of replevin between such tenant and the bailiff of the landlord, in which the arrears of rent were claimed. *Lammott* v. *Gist*, 2 Har. & Gill, 433.

PARTIES.

1. It is a general rule, that all the parties composing a firm must be named as plaintiffs, and an omission to name them, may be taken advantage of under the plea of *non assumpsit;* but there is an exception to this rule; for where there are *dormant partners*, it is not necessary they should be named in the writ. *Mitchell* v. *Dall*, 2 Har & Gill, 159.
2. In the legal acceptation of the term *dormant*, as applied to partners in trade, every partner is considered dormant, unless his name is mentioned in the firm, or embraced under general terms as the name of one of the firm and company. *Ib.*

PARTNERS.

1. C. & T. drew a bill in favor of M. on D. & B. partners in trade, which they accepted. M. sued D. & B. at law on their acceptance, and pending the suit D. died. Judgment was had against B, and he being insolvent obtained a discharge under the insolvent laws. P. administered on D's. estate, and received assets from his separate property to a large amount, though insufficient to pay D's. individual debts; he also received some of the partnership funds. The judgment not being paid, and the partnership funds being insufficient to pay its debt, M. filed a bill in equity against D's. administrator, claiming to be paid out of the separate assets, an equal proportion with D's. separate creditors. *Held*, that he was not entitled to recover. *M'Culloch* v. *Dashiell's Adm'r.*, 2 Har. & Gill, 96.
2. One partner cannot maintain an action against his co-partners, for work and labor done on account of the partnership. *Causten* v. *Burke*, 1 Har. & Gill, 295.
2. The plaintiff was associated with the defendant and others, in a particular concern not rendering it the duty of either of them to leave his place of residence. At a meeting of the association, when the plaintiff was not present, it was proposed to employ him to go to a distant place, to look after the property of the concern, the plaintiff was then sent for, and accepted the employment for a fixed compensation, performed the services required, and brought an action of *assumpsit* against one of the partners to recover the sum agreed to be paid him.

The party sued pleaded the general issue. *Held*, that this agreement was an undertaking on account of the concern, that the same engagement entered into with a stranger, would have been binding on the firm; and that the plaintiff as a member of that firm, must have contributed his proportionate part of the sum contracted to be paid, and, therefore, could not sustain his action. *Ib.*

4. Real estate, acquired with partnership funds, for partnership purposes, will be regarded in equity as partnership stock, and liable to all the incidents attending that description of property. *Sigourney* v. *Munn*, 7 Con. 11.
5. So, real estate, originally put in as partnership stock, or subsequently acquired with partnership funds, may, by agreement of the partners, in their articles, or at the time of the purchase, become partnership stock. *Ib.*
6. In winding up the concerns of a partnership, after a dissolution, one partner cannot take the partnership stock at a valuation; but its value must be ascertained, by a conversion of it into money. *Ib.*

See SET OFF, 1, 2.; PARTIES; EVIDENCE, 25.

PLEADING.

1. Where matter of defence arises after the institution of a suit, it must in general be specially pleaded, and cannot be given in evidence under the general issue. *Agnew* v. *The Bank of Gettysburg*, 2 Har. & Gill, 478.
2. Though the charter of incorporation of a turnpike company is a private act, which the court will not *ex officio* take notice of, but such parts as may be material must be stated with certainty to a common intent at least; yet it is enough if it be counted upon, and the substance stated. *Goshen and Sharon Turnpike* v. *Sears*, 7 Con. 86.
3. And where the law presumes, that the knowledge of the facts is in the opposite party, less certainty is required, because the principal object of pleading, is, to state facts, of which the opposite party is supposed not to have knowledge. *Ib.*
4. In an action for harboring an apprentice, to entitle the plaintiff to recover, he must allege the tenor, or substance and legal effect of the indenture of apprenticeship. *Ferguson* v. *Tucker*, 2 Har. & Gill, 182.
5. Whatever apparent inconsistency there may be between the pleas of general performance and *non est factum*, it is the settled practice under the statute, 4 Anne, ch. 16, to receive them; for defendants are not confined to pleas strictly consistent. *Union Bank of Maryland* v. *Ridgely*, 1 Har. & Gill, 324.
6. The only pleas now disallowed, on the mere ground of inconsistency, are the general issue and tender; and the reason is,

that one goes to deny the existence of any, while the other admits some cause of action. *Ib.*

7. Where the plaintiffs, in their replication set out a code of by-laws of their corporation, which prescribe the duties of an officer of the corporation, and then assigns as a breach, a violation of duties so prescribed, on which breach issue is tendered by the defendant, and joined by the plaintiffs, such by-laws are virtually admitted by the defendant in his pleadings. *Ib.*

9. Under an issue joined upon a plea of general *non est factum*, the defendant may give in evidence any thing which goes to show that the instrument of writing was originally void at common law, as lunacy, fraud, coveture, &c.; or that it had become void subsequent to its execution, as by erasure, alterations, &c. for that plea puts in issue, as well its continuance as a deed, as its execution. *Ib.*

10. If a defendant seeks to avoid a bond by duress, infancy, usury, &c. which cannot be given in evidence under the general issue, (the bond not being therefore void, but voidable,) he must plead such new special matter with a verification; and the proof lies upon him. In every such case the issue is upon the matter specially alleged in the plea. *Ib.*

11. The defendant may give in evidence, under the plea of general *non est factum*, that the instrument of writing was delivered as an *escrow*, on a condition not performed; and it is settled he may plead it specially, and that the proper conclusion to that plea is to the country; because it is a *special negative* to the affirmative in the declaration—the allegation in the declaration that it is the writing obligatory of the defendant, including the allegation of the delivery of it as a deed; and it is this conclusion to the country, that raises the question, whether the proof is on the plaintiff or defendant. *Ib.*

12. Where the delivery of a deed as an *escrow* is pleaded, the issue is upon that special matter, which being alleged and relied upon by the defendant to show that it is not his deed, the proof of that allegation rests upon him; and if there be no proof on the part of the defendant, the possession of the instrument by the plaintiff, is *prima facie* evidence of the delivery as a deed, and is sufficient to sustain the issue on his part. *Ib.*

13. If the delivery as an *escrow* be proved on the part of the defendant, as alleged in the plea, the proof of the performance of the condition lies upon the plaintiff where the affirmative is with him. *Ib.*

14. And where the defendant pleaded that he signed the supposed writing obligatory at the request of the principal obligor, and as his surety, and returned it to him, to be by him submitted to the obligees, (a corporation) for their approbation and acceptance; and if it should be approved and accepted by them,

that then it was to be considered and delivered as the act and deed of the defendant; and that it never was approved by the obligees by any act in their corporate capacity, and so it was not his deed. *Held*, that in the absence of all evidence on the part of the defendant, the possession and production of the instrument of writing by the obligees would be sufficient *prima facie* evidence of the delivery and acceptance, to entitle them to a verdict on the issue joined on such a plea. *Ib.*

15. In assigning the breaches of the condition of a bond, which was taken and intended as a security for a limited period, the time of the commission of the breach, is so far material that it must be laid to be within such period; and an allegation of a breach beyond that period, renders the whole assignment defective, and bad on demurrer—as it then appears on the record that the defendant is charged beyond his legal responsibility. *Ib.*

See CORPORATION, 6.

PRACTICE.

1. Upon a case stated, as upon a special verdict, the court are not at liberty to infer facts from the evidence therein, but the fact relied on must be stated. *Reeside* v. *Fischer*, 2 Har. & Gill, 320.
2. Where the defence relied on was, that the goods replevied were in the custody of the law, and the parties stated a case which showed, that the goods replevied had been levied on under a writ of *fieri facias*, but was silent as to the time of seizure; and also whether at the time of the replevin from the officer who had levied on them, they were in his hands under the *fieri facias*. *Held*, that this might be all true, and still the goods not in the custody of law. *Ib.*
3. Though regularly a sheriff, in taking goods under a writ of replevin, should summon the defendant, according to the mandate of the writ, yet if he neglects to do so, and the defendant voluntarily appears in court, and defends the action, the omission by the sheriff to summon him is thereby cured. *Swann* v. *Shemwell*, 2 Har. & Gill, 283.
4. So, where to a writ of replevin, the sheriff made no return of the writ, and an *alias* writ was issued, to which the sheriff made a return *Eloigned*, and the plaintiff then sued out a *capias in withernam*, to which the sheriff returned, 'replevied and delivered, as per schedule,' and the defendant then appeared, pleaded to the plaintiff's declaration, and went to trial. *Held*, that it was too late for the defendant to object, that there was no return made to the summons in the writ of replevin, nor day given him in court. *Ib.*
5. If the defendant, before the return of the writ of *withernam*, appears to the writ of replevin, and offers to plead *non cepit*, it

will stay the writ of *withernam*, as he is not concluded by the return of *elongavit*. *Ib.*

PRINCIPAL AND SURETY.

1. Upon established principles of equity, a surety has a right to call on a creditor for an assignment of the judgment against the *principal*, and all liens which he had given to the creditor; but he is not entitled to an assignment of any *supersedeas* judgment entered into by the principal with sureties. *Hollingsworth's Adm'x.* v. *Floyd*, 2 Har. & Gill, 87.
2. A payment *in full* by a surety has been adjudged of itself, to operate as an assignment, so as to enable him to use the name of the creditor to recover the money from his principal. *Ib.*
3. A payment of *part of a debt* by a surety, does not entitle him to an assignment of the creditor's securities *pro tanto*. *Ib.*

RECORD.

The description of a record is matter of substance; and a mistake in describing it, is a fatal error. *Cutler* v. *Wadsworth*, 7 Con. 6.

RENTS AND PROFITS.

1. Whoever comes into the possession of an estate under a fraudulent conveyance, must account for the rents and profits when the fraudulent conveyance is vacated. *Strike* v. *M'Donald*, 2 Har. & Gill, 191.
2. When a bill is brought upon an equitable title, and there is a trust, and in the case of an infant, or where there has been any fraud, or in cases of dower, an account of the rents and profits will be ordered, and that from the time the title accrued, until the defendant was put out of possession. Per *Bland*, Chan. *Ib.*

REPLEVIN.

1. One joint owner of a chattel cannot maintain replevin against another. *M'Elderry* v. *Flannagan*, 1 Har. & Gill, 308.
2. The common law did not give damages in replevin to a defendant; but they were allowed to certain defendants in that action, viz. avowants, or other persons making conusance, or justifying as bailiffs, for rents or services, by the statutes of 7 Hen. VIII. ch. 4, and 21 Hen. VIII. ch. 19, which have not been extended to defendants claiming property; their remedy, where any exists, is by a suit on the replevin bond. *Hopewell* v. *Price*, 2 Har. & Gill, 275.

See PRACTICE, 3, 4, 5.

RULES OF COURT.

Where a court has established rules for its government and that of suitors, fixing days for the filing of pleadings; and where the long established practice of the court requires special pleas to be drawn up and filed at length, there exists no discretion in the court, to dispense, at pleasure, with its own rules, or to innovate upon such established practice. And a party injured

by such a course has an undoubted right to seek redress in an appellate court. *Wall's Ex'x.* v. *Wall*, 2 Har. & Gill, 79.

SALE.

1. Where a tract of land is sold, as containing a given quantity of acres, and it is discovered that less is included than was conceived at the time of the sale, a deduction will be made, unless the deficiency shall be such as would have prevented the contract, if known at the time of the purchase; that is, the deficiency appearing to be in that part which was the chief inducement to purchase. Per *Johnson*, Chan. *Anderson* v. *Foulke*, 2 Har. & Gill, 346.
2. If a trustee, who is directed by a decree to sell a tract of land entire, and at public sale, should sell it at private sale and in parcels, or in any other manner different from the mode prescribed, and report satisfactory reasons for doing so, and no objection is made, the sale may be ratified. Per *Bland*, Chan. *Ib.*

SALE OF CHATTELS.

1. The retention of possession of personal property by a vendor, will not contaminate his transfer, where his deed showed, that the sale was not to have its completion immediately, but was prospective to a future event; until that future time, his possession is entirely consistent with his deed. *Hudson* v. *Warner*, 2 Har. & Gill, 415.
2. The failure of a mortgagee of personal property, to take possession at the time of the forfeiture, as stipulated in the mortgage, does not vitiate a deed, which in its inception was valid and effectual. *Ib.*

See DAMAGES, 4.

SCIRE FACIAS. See EXECUTION.

SEAMAN.

The mate of a vessel is not 'a seaman or mariner' within the act of congress for the government and regulation of seamen in the merchants' service, nor subject to the penalties inflicted by that act for desertion. *Ely* v. *Peck*, 7 Con. 240.

SERVICE. See PRACTICE, 3, 4.

SET OFF.

1. A judgment in favor of A against B individually, and a judgment in favor of a copartnership consisting of B and C against A, are not mutual debts; and one cannot be set off against the other. *Francis* v. *Rand*, 7 Con. 221.
2. Nor in such case, will an assignment of one of the partners' interest in the judgment to the other, enable the latter to set off that judgment against the separate judgment, unless the separate creditor had notice of such assignment, at the time of the commencement of the suit in which the set-off is sought. *Ib.*
3. *Qu.* Whether an attorney has any lien on a judgment in

1. Where a plaintiff offers no testimony to the jury, or such as is so slight and inconclusive that a rational mind cannot draw the conclusions sought to be deduced from it, it is the right of the court, and their duty, when applied to for that purpose, to instruct the jury, that the plaintiff is not entitled to recover. *Morris* v. *Brickley*, 1 Har. & Gill, 107.
2. A positive and absolute direction to the jury will not be granted, if it obliges the court to discredit a witness; to do that the intervention of a jury is peculiarly necessary. *Ib.*

TOBACCO (currency).

1. In an action in Maryland on a contract to pay in tobacco, the jury may give damages in money. *Laidler's Adm'x.* v. *The State*, 2 Har. & Gill, 277.
2. From the earliest period to this time, tobacco has been considered in the judicial proceedings of that state as current money, and actions of debt on bonds for payment of it, have been constantly brought in the *debet and detinet*, without averring its value, in the current coin of the state. *Crain* v. *Yates*, 2 Har. & Gill, 332.
3. It has been the practice in actions of debt, to join tobacco and money counts; and the invariable course to render judgments in debt for tobacco, and costs in current money, or for costs in tobacco at a fixed and established value in current money. *Ib.*

TRESPASS.

1. Though the action of trespass is founded on possession; yet the possession may be constructive, and need not be actual. *Bulkley* v. *Dolbeare*, 7 Con. 232.
2. The general property of trees, felled on land in the possession of a tenant for years, after severance, is in the owner of the land. *Ib.*
3. Therefore, the owner of land, in the possession of such tenant, may maintain trespass *de bonis asportatis*, against a stranger, for the carrying away of trees, after severance, felled by the defendant on such land. *Ib.*

See DAMAGES, 1, 2, 3.

TRUST AND TRUSTEES.

1. D. and L. being infants, and contemplating a marriage, the former (the intended wife,) being possessed of a large amount of United States stock, a few days before her marriage transferred by deed the entire legal estate therein to trustees, who were to permit her to receive during life the dividends and profits of the stock. She reserved no power over the principal except the *jus disponendi* by last will and testament, to take effect in case she died without leaving a child or descendant. After their marriage and coming of age, on a bill filed by them against the trustees, praying to modify the trust, by having a part of the trust funds invested, under the direction of the hus-

band, in the purchase of a farm—*Held*, that whether the deed was valid or fraudulent, the court could not change the trust; that if valid, it had given the parties no control over the principal fund, and a court of equity did not possess any power to change and modify trusts contrary to the manifest intention of the deeds creating them; or if a fraud on the rights of the intended husband, though the court might set the deed aside, yet it could make no terms with a fraudulent instrument. *Lowry* v. *Tiernan*, 2 Har. & Gill, 34.

2. Where a *cestui que trust* has undertaken to indemnify his trustee, a court of equity ought to be satisfied that he was free to act as a rational, intelligent man, not governed by considerations growing out of a dependent condition; otherwise the indemnities will be disregarded. *Ringgold* v. *Ringgold*, 1 Har. & Gill, 11.
3. A sale by one trustee to his co-trustee, is illegal. *Ib.*
4. Trustees empowered by deed to sell real estate, and with the proceeds pay debts and make investments in stock, are not authorized to exchange the trust property for other real property. By making such exchange, though with the best intentions, they are responsible for the full value of the property parted with. *Ib.*
5. Where S. and T. sold personal property, with the assent of its owner, took bonds in their own names from the purchasers, collected a part of the purchase money, proffered themselves ready to account for such sales, made a return thereof as trustees, a court of equity will infer some conventional arrangement between the parties, in the nature of a trust, which may be enforced in that court. *Ib.*
6. Co-trustees are bound to know the receipts, and watch over the conduct of each other. Where one trustee received trust funds applicable to outstanding debts which he did not pay; nor did he keep such funds separated from the mass of his estate, a co-trustee, who from his situation must know of such receipts, yet makes no effort to obtain them, or have them applied, is jointly chargeable for interest with his associate. *Ib.*
7. Where trustees, transcending their powers, make investments in unproductive property, they are chargeable with interest. *Ib.*
8. Where property is conveyed to trustees, to be sold for the payment of debts, and the surplus to be invested in stocks to produce interest, which interest is specifically appropriated by the terms of the conveyance, and the proceeds of such estate being in hand, it was the imperative duty of the trustees to have invested, unless a portion, or the whole, had been demanded by acknowledged debts; but where hopes were entertained by the trustees that a claim, then depending in chancery, would be perpetually enjoined, it having been litigated for

several years, and no reasonable expectation of a speedy close, they were not justified in laying by the money, and waiting the event of a protracted chancery suit. In such a case, the trustees were grossly negligent, and must pay interest. *Ib.*

9. Compound interest will be allowed where a trustee is directed to invest funds, and to reinvest the dividends; or where the trust directs an accumulation, and the trustee has used the funds. Yet the ground of this allowance is the actual or presumed gain of the trustee by the use of the funds; and where the circumstances forbid the presumption of gain by the trustee, it will not be allowed. *Ib.*

10. To trustees who have invested, or made efforts to invest, trust funds, a rest of six months on their receipts, without interest, will be allowed as a reasonable time within which to invest; but where they manifested no disposition to make such application of their receipts, as the trust contemplated, no such rest is allowed. *Ib.*

See DEPOSIT; EXECUTORS AND ADMINISTRATORS, 4.

TURNPIKE CORPORATION.

1. A turnpike company, by accepting the charter of incorporation, making the road, and receiving toll of passengers, becomes bound to keep the road in repair. *The Goshen and Sharon Turnpike Company* v. *Sears*, 7 Con. 86.

2. He who is chargeable with the first wrongful act or neglect, which occasions, through a connected series of causes and effects, an injury to another without his fault, is responsible for that injury, provided there is no intermediate responsible cause. *Ib.*

3. Therefore, where the plaintiff brought an action on the statute relating to roads and bridges, against a turnpike company, alleging, that the defendants in May, 1803, were incorporated, by the general assembly, with power to sue and be sued, to plead and be impleaded in all courts of record, to ordain and establish such by-laws, ordinances, and regulations as should be necessary for the purpose of carrying into effect the objects of the corporation, viz. the construction of a public road from T. to S., with power also to erect gates and take toll on said road; that the defendants, soon afterwards, made said road, erected toll-gates thereon, and received toll of passengers, and said road had ever since belonged to the defendants; that on the 1st of October, 1825, while the plaintiff was travelling on said road, which it then was, and still is, the duty of the defendants to repair, there were, through the neglect of the defendants, large gullies across said road, and as the plaintiff was descending a hill in a sulkey, in company with one P., who was driving a horse in a waggon behind the plaintiff, the harness of P's. horse was broken, by said gullies, and the horse,

by reason thereof, became unmanageable, and ran upon the plaintiff's vehicle, and overturned it, though the plaintiff used all possible means to avoid said horse and waggon, in consequence of which the plaintiff was greatly injured; after a verdict for the plaintiff, it was *held*, 1. that the obligation of the defendants to keep the road in repair, was sufficiently stated in the declaration; and 2. that the defendants were responsible for the plaintiff's injury. *Ib.*

UNCERTAINTY. See SHIPPING ARTICLES.

USURY.

1. A promissory note for $ 1745, payable ninety days after date, made by B. at the request of E., and for his accommodation, and by E. taken to G. who endorsed it with E. and then delivered by G. to M. who negotiated it with H. for the sum of $ 1648, which was paid to F. is void for usury. *Sauerwein* v. *Brunner*, 1 Har. & Gill, 477.
2. Where a note commences in usury; or in other words, where a note is tainted with usury at its birth, when it first becomes legally efficient and operative so as to give to the holder a right of action upon it, no subsequent holder, for a valuable consideration, without notice of such usury, can maintain a suit upon it; such note being declared by statute null and void. *Ib.*
3. A note endorsed for the accommodation of the maker, and passed by him as a security for a usurious loan, is a usurious contract in its inception; as the lender is in fact to be considered the first holder of the note. *Ib.*
4. A loan at par of bank notes passing at from 2 to 5 per cent. discount, unexplained by circumstances, would be usurious; but where the borrower was at liberty to return them to the lender at their par value, and so exempt himself from loss, such a transaction would not be deemed usurious, unless that privilege was a mere cover to cloak a usurious design. *Caton* v. *Shaw*, 2 Har. & Gill, 13.

VERDICT.

1. Where the parties agreed that the jury might give their verdict to the clerk of the court after the adjournment for the day, and the jury having signed and sealed a verdict, delivered it to him, but on being called at the bar the next morning, before it was recorded, they were sent back to their chamber by the court to correct it, as it did not determine the issues joined in the cause to their full extent, and they found a new verdict which did: *Held*, that the first verdict might be compared to one received by a judge out of court, or to a sealed verdict retained by the foreman of the jury in his pocket, in neither of which cases is the verdict binding upon the jury, but is liable to be changed and varied from by them in open court; and that

a judgment entered on the second verdict was correct. *Edelin* v. *Thompson*, 2 Har. & Gill, 31.

VOLUNTARY AGREEMENT. See SPECIFIC PERFORMANCE.

WARRANTY.

1. In sales by executors and administrators, if fraud exists, or there is an express warranty, and eviction, they would undoubtedly be personally answerable to the purchaser. *Mocbee's Adm'r.* v. *Garner*, 2 Har. & Gill, 176.
2. And in the case of a failure of title, while the purchase money for the property sold remained in their hands undistributed or unadministered, there would exist no well founded reason why they should not refund to the purchaser. *Ib.*
3. To create an express warranty, the word warrant need not be used, nor is any precise form of expression required; any affirmation of the quality or condition of the thing sold, (not uttered as matter of opinion or belief,) made by the seller at the time of sale, for the purpose of assuring the buyer of the truth of the fact affirmed, and inducing him to make the purchase, if so received and relied on by the purchaser, is an express warranty. *Osgood* v. *Lewis*, 2 Har. & Gill, 495.
4. In cases of oral contracts it is the province of the jury to decide upon the existence of the ingredients necessary to constitute a warranty. *Ib.*
5. But in cases of written contracts, whether the instrument contain an express warranty or not, the court must determine. *Ib.*
6. The statement in a bill of parcels for a quantity of oil, that it was 'winter pressed sperm oil,' is an express warranty by the vendor that such oil was winter pressed. *Ib.*

WILL.

1. The words, 'without issue,' in a will, when applied to dispositions of real estate, *ex vi termini*, mean an indefinite failure of issue, if there be nothing in the will restricting it to a failure at the time of the death of the first devisee, or to some other time or event. *Newton* v. *Griffith*, 1 Har. & Gill, 111.
2. To have no issue, to die having no issue, and to die without issue, are technically and judicially convertible terms. *Ib.*
3. The words *leaving*, *having*, and *without*, in devises—as 'if he shall die without *leaving* any issue;' 'without *having* issue,' or '*without* issue,' have acquired a technical judicial sense, and when applied to real estate, mean an indefinite failure of issue. *Ib.*
4. If there be a devise to one generally of the freehold and personal estates without any words of limitation, he will take an estate for life only in the freehold, but the personal estate absolutely. *Ib.*

See DEVISE.

WITHERNAM. See PRACTICE, 5.

WITNESS.

1. A witness, on his cross-examination, may be inquired of, whether he has not had a controversy with the party against whom he testifies, and whether he has not threatened to be revenged on him, for the purpose of discrediting his testimony; and if his answer is in the negative, it may be contradicted by other witnesses. *Atwood* v. *Welton*, 7 Con. 66.
2. A person who disbelieves in any punishment in a future state, though he believes in the existence of the Supreme Being, and that men are punished in this life for their sins, is not a competent witness. *Ib.*

See EVIDENCE, 3, 4, 6.

WRIT AND DECLARATION. See BILLS OF EXCHANGE, AND PROMISSORY NOTES, 2.

LEGISLATION.

Maine.

At the session of the legislature of Maine, held in January, 1829, forty-one public acts and sixty-five private acts were passed. The private acts are published and numbered separately; an arrangement which we hope may be imitated elsewhere.

Ch. 449. *Militia.* Upon the requisition of any commanding officer of a company, at five days notice, the selectmen of towns and the assessors of plantations are to 'pay, at the place of inspection and review, to each officer and member of the company belonging to such town or plantation, who shall then and there' perform military duty, twenty-five cents.

Ch. 446. *Disputed Territory.* 'If any person, not a citizen of the United States, or any person under the authority, or color, or pretence of authority from any foreign prince, state, or government,' exercise any acts of ownership or jurisdiction within the limits of the state, as described by the treaty of 1783, or claim right, or threaten so to do, such person and his abettors are to be deemed guilty of a high misdemeanor, and are liable to be tried for the offence by 'any court having competent jurisdiction, in any county within this state, and shall be punished by fine and imprisonment at the discretion of the court, according to the nature and aggravation of the offence.'

Ch. 418. *Witnesses.* Persons who have been stockholders of any bank in the state, after the transfer of their stock therein, are to be deemed competent witnesses for or against the bank.

Ch. 441. *Justices of the Peace.* Justices of the peace, whose commissions have expired or may expire, and shall not be renewed, are authorized to issue and renew executions on judgments and recognisances, by them rendered or taken while in commission; but this authority is not to continue beyond the term of two years from the expiration of their commissions.

Ch. 443. They are authorized to hear and determine 'any action of replevin, for the replevying any goods and chattels, not exceeding the value of twenty dollars.'

Ch. 448. If any justice of the peace dies or removes from the state, without recording and signing any judgment rendered by him, and his docket, the original writ, and the executions returned are deposited in the office of the clerk of the judicial courts of

the county within which he had jurisdiction, the clerk, when requested, is to 'make out and certify copies of the original writ and execution, if any issued, which copies shall be deemed sufficient evidence to maintain an action of debt thereon;' provided the clerk shall also certify that the docket was kept in legal form, and that the action was duly entered. If any justice of the peace neglects, for sixty days after the rendition of any judgment, to make up and sign a record thereof, he is to forfeit a sum not exceeding $100, nor less than $20, to the use of any person suing therefor, and he is further liable for all damages sustained by reason of such neglect.

Ch. 442. *Foreign Attachment.* 'Any persons, body politic or corporate, entitled to any personal action (except such as are excepted by "An act concerning foreign attachment,") against any person or persons, body politic or corporate, having any goods, effects, or credits so entrusted or deposited with any other body politic or corporate, (except counties, towns, and parishes) that the same cannot be attached by the ordinary process of law,' may cause them to be attached by process of foreign attachment; the corporation may appear by attorney or agent and make disclosure, and such disclosure is to be in writing and sworn to by the attorney or agent.

Ch. 431. *Attachment.* 'The estate, right, title, and interest, which any person has by virtue of a bond or contract in writing, to a conveyance of real estate,' upon conditions to be performed, may be taken by attachment, and may be seized and sold on execution, in the same manner as an equity of redemption: and a similar right of redeeming is reserved to the debtor. The purchaser may, by bill in equity, compel the obligor or contractor to convey, upon performance of the conditions. If the obligor or contractor refuse to give information of the conditions remaining unperformed, on the part of the obligee or holder of the contract, the purchaser may maintain his bill, without offering to perform them, and may pray in his bill for a discovery thereof; and the respondent is required to disclose all matters duly prayed for therein. If an assignment by the obligee or person entitled to a conveyance, made previously to the attachment, is pleaded or disclosed, and the complainant put in issue its validity, the court is to cause the person so disclosed as assignee to be made a party to the bill, and, after notice to him, the issue is to be tried by a jury; if the assignment is found to be fraudulent, it is not to operate as a bar to the conveyance.

Ch. 444. *Courts.* The Supreme Judicial Court is to have original and concurrent jurisdiction with the Court of Common Pleas, in actions of assumpsit, debt, trespass, or case, where the damages demanded exceed $300. If the plaintiff, in an action commenced in the Supreme Court, fail to recover so much as

$ 100 as damages, he is not to recover costs; but the provision as to costs is not to apply to actions between towns.

'No stipulation, except in actions of replevin or trespass *quare clausum fregit*, and real actions, reserving the right to wave the pleading or statement of the case made in the Court of Common Pleas,' is to be allowed; but the Supreme Court may order amendments or a repleader.

Ch. 440. *Divorces.* Divorces are to be decreed, in case either of the parties wilfully desert the other without cause, for the term of five years, or join and continue with the Society of Shakers, separate from the other party, for that term, or is confined in the state's prison, for that term. If it appear that the desertion or joining the Shakers was by collusion; or if the application is made by the party deserting, or joining said society, or confined in prison; or if the parties have cohabited together after said term of time, which shall be the alleged cause of divorce, no divorce is to be decreed; but no divorce on account of any of these causes is to bar the issue from inheriting. The same provision is to be made in favor of the libellant, as in the case of divorce for adultery. If a divorce for these causes is decreed on the application of the wife, she is to be entitled to her dower.

Ch. 436. *Licenses.* Selectmen of towns and assessors of plantations are to deliver to each innholder and retailer, by them licensed, the names of intemperate persons; and every innholder or retailer who shall sell spirituous liquors to any such person, is to forfeit $ 5 for every offence. Innholders are to keep a printed copy of the act posted up in some conspicuous place in their houses; retailers and victuallers in their shops.

Ch. 423. *Temperence.* Innholders, retailers, and victuallers are not to furnish any spirituous liquors to any person known to them to be a non-commissioned officer or soldier, in the service of the United States, within five miles of any military post in this state, or to any such officer or soldier on duty, beyond the distance of five miles from any such military post, without a permit from the commanding officer of the corps to which he belongs, under penalty of forfeiting $ 10 for every offence; provided the commanding officer cause to be posted up, in the office of the clerk of the town or plantation, wherein such innholder or retailer resides, a list of the names of the non-commissioned officers and soldiers of his corps.

Ch. 430. *Crimes.* Robbers, burglars, persons convicted of rape, or carnal abuse of females under the age of ten years, and their accessaries before the fact, are to be punished by confinement to hard labor in the state's prison for life. Incendiaries, by whose agency any dwelling house shall be burnt in the night time, with their accessaries before the fact, are to suffer the pun-

ishment of death. Jailors, voluntarily suffering any prisoner charged with a capital felony, to escape, are to be punished by fine, not exceeding $1000, and by confinement to hard labor in the state's prison for a term not less than five years, nor more than fifteen; if the escape is suffered after the prisoner has been convicted, the confinement is to continue for life.

Ch. 433. If any person, indicted for any offence, is acquitted as to part of the indictment, and convicted as to the residue, the verdict may be accepted and recorded, and he may be adjudged guilty of the offence, if any, which shall be substantially alleged in the residue of the indictment, and punished accordingly.

Ch. 420. *Burying Grounds.* This act enables persons to incorporate themselves, for the purpose of purchasing lands for burying grounds and repairing the fences enclosing the same. They are to apply to any justice of the peace in the county where they reside; who is to issue his warrant to one of the applicants, directing him to notify the applicants personally to meet for the purpose of incorporating themselves as a body politic; when assembled, they are to choose proper officers, and thereupon are to become a body politic, and to be known by such name as they may adopt. Every such body politic, within one year after its organization, is to erect a fence around the burying ground belonging to it, and keep it in good repair; in case of neglect, it is to pay a fine of $100, to be expended in erecting and repairing the fence.

Private and Special Acts. Among the private acts we notice six acts for the incorporation of mutual fire insurance companies; five acts for the *protection* of pickerel, alewives, &c. in certain places; five acts incorporating manufacturing companies; acts, incorporating two agricultural societies, two academies, a stage company, 'The Kennebec Ferry Company,' 'The Master, Wardens, and Members of Fraternal Lodge,' a Society for the relief of the indigent widows and children of deceased congregational ministers, two banks, and two companies for erecting bridges.

We also notice an act to assess a tax of $50,000, which exempts the property of literary and charitable institutions from taxation; persons residing in any town as students in literary seminaries, and Indians, are also exempted.

New Hampshire.

At the session of the Legislature of New Hampshire, held in June, 1829, twenty-nine public acts, forty-eight private acts, and eighteen resolutions, were passed. A digest of all the public statutes could not be compressed within reasonable limits. It is our object, therefore, in the following abstract, to select the most important and interesting provisions. A large proportion of these acts are revisions of the former laws.

Ch. 19. *Salaries.* The Governor is to receive, for his salary from June 1829 to June 1830, the sum of $1200; the Secretary, $800; the Treasurer, $600; the Adjutant General, $400. Members of the Council are to receive $2 a day, during the session of the general court, $2 50 if called together during the recess thereof, and 10 cents a mile for travel. The pay of the President of the Senate and Speaker of the House of Representatives is $2 50 a day, during the session of the General Court, and 10 cents a mile for travel; and the pay of the members thereof is $3 a day, during the session, and 10 cents a mile for travel.

Ch. 45. *Coroners.* This act prescribes the general duties of coroners. No inquest is to be taken, except by the consent, in writing, of the majority of the selectmen of the town in which the dead body is found. The jury of inquest is to consist of '*three* reputable freeholders, one of whom shall be a justice of the peace.'

Ch. 18. *Sheriffs.* This act prescribes the general duties of sheriffs and their deputies, and appears to be a revision of the former laws on this subject.

Ch. 26. *Judges of Probate.* If the judge of probate of any county is interested in an estate, under administration in such county, as heir or legatee, the account of the executor or administrator is to be rendered before the judge of probate of an adjoining county, and settled by him. If the executor or administrator of an estate is 'appointed judge of probate for the county, in which said estate is administered, before the same is fully settled,' 'all matters and things,' relating to the administration thereof are to be determined by the judge of probate of an adjoining county.

Ch. 36. *Public Notaries.* Public notaries are to be commissioned, for the term of five years, and are subject to be removed by the senate, upon impeachment, or by the Governor with the consent of the council, on the address of both houses of the legislature. They are authorized to take depositions and acknowledgments of deeds, &c. If any public notary in the state 'ceases practising therein,' his records and papers are to be deposited in the office of the Secretary of State. If they are not so deposited, the Secretary of State is authorized to demand and receive them of the person, in whose possession they may be; and if such person refuse to deliver them, he is to forfeit the sum of $1000, one moiety thereof, to the use of the person suing for the same, the other moiety to the use of the county, of which the notary was last an inhabitant. Copies, certified by the Secretary of State, under the seal of the state, are to have the same effect as if certified, under the seal of the notary.

Ch. 62. *Executions.* This act is a revision of the former laws, prescribing the mode of levying executions upon real and personal estate.

Ch. 25. *Deeds.* This act is a revision of the former statutes, on the subject of conveyances by deed. By the third section, it is enacted that the purchaser of any real estate may record the deed, 'in any county, besides recording it in the county where such estate lies; and in case of misfortune to the original deed, and destruction of the records in the county where such estate lies,' an attested copy 'from any of the other county records, shall be as authentic as copies from the register's office in the county where such estate is situate.'

Ch. 50. *Partition of Real Estate.* This act authorizes the superior court of judicature to make partition of real estate, and prescribes the mode.

Ch. 37. *Dower.* This statute 'regulates the assignment of dower.' No woman is to be entitled to dower in any lands whereof her husband was seized during the coverture, unless they were in a state of cultivation during such seizin, or were used as 'a wood or timber lot, and occupied with or as appurtenant to some tenement at the same time owned by such husband.' The widow of any person is to be endowed of so much of the lands, &c. of her husband, as will produce an income equal to one third of the income thereof, at the time her husband died seized thereof, or lost or parted with his title thereto. Women are to be 'liable to respond in damages,' for any strip or waste, committed on lands, &c. whereof they shall be endowed.

Ch. 49. *Mortgages.* The right to redeem is foreclosed by a 'peaceable and continued actual possession of the premises,' by the mortgagee or person having his estate, for the space of one year after entry for condition broken, or (if he is in possession at the time the condition is broken) after notice to the mortgager or the person having his right, that the possession is held for the purpose of foreclosing. Every conveyance of land, for the purpose of securing the performance of any 'thing in the condition of such conveyance stated,' is to be deemed a mortgage; but no estate of freehold, or lease for more than seven years of lands, &c. is to be encumbered or defeated by any agreement, unless the agreement is inserted in the conveyance. No estate of freehold or lease for more than seven years conveyed in mortgage, is to be held by the mortgagee as security for the performance of any thing, the obligation to perform which 'shall arise, be made, or contracted, after the execution and delivery of such mortgage.'

Ch. 35. *Frauds and Perjuries.* This act is a revision of former acts on this subject.

Ch. 47. *Trustee Process.* This act is also a revision of former laws. If any 'corporation or body politic' is possessed of any 'money, goods, chattels, rights, or credits' of a debtor, it shall be liable to answer as the trustee of such debtor, and may be required to disclose on oath by the cashier, or agent, or person conducting

the concerns thereof.' If a trustee is under contract for the delivery of specific articles to the principal debtor, execution is to 'issue against the trustee, for such articles to be delivered,' to the creditor, who is to levy his execution thereon.' 'Any trustee process may be brought and maintained, before any justice of the peace, in the county where the trustee' resides, if the 'sum demanded in damages against the principal debtor,' does not exceed the sum of $13 33; but no 'person or party' is liable to 'appear or answer to any trustee process,' before a justice of the peace, 'unless the place, appointed for the return and hearing of the same, shall be within the town where such person or party shall reside.'

Ch. 65. *Lands of Non-Residents.* If the taxes, assessed upon the unimproved lands of non-residents, are not paid, together with incidental charges, the collector is to sell, by auction, so much of the land as will be sufficient to pay the taxes and charges. The land so sold may be redeemed, at any time within one year from the sale, on payment or tender to the collector, his executor or administrator, 'a sum of money, equal to that for which the land may have been sold, with interest at the rate of 12 per cent. per annum, for the same, until the time of payment or tender;' or in his absence, by tender thereof, at his usual place of abode. In case of his absence, on tender being made at his place of abode, the money is to be paid to the clerk of the town, where the land lies, for the use of the collector. If it is received by the town clerk, he is to be paid 10 per cent. on the amount. Every purchaser of land so sold, upon the redemption thereof, is to be 'entitled to receive 12 per cent. per annum, upon the purchase money.' If the land is not redeemed, the collector, his executors or administrators, are to execute a deed thereof to the purchaser or his heirs.

Ch. 56. *Witnesses.* Members of incorporated mutual fire insurance companies are to be admitted as witnesses, in cases in which the company is interested,' in the same manner as inhabitants of towns are now admitted.'

Ch. 61. The sum of $40,000 is to be raised, for the use of the state.

Private Acts. Among the private acts, we notice nine for the incorporation of 'social' or 'union' library societies; two acts, incorporating manufacturing companies; acts incorporating the 'Concord Aqueduct Association, 'the Meridian Sun Chapter,' the 'Libanus Lodge, No. 49,' the 'Belknap Chapter, No. 8,' &c.; and an act providing that the town of ADAMS may assume the name of JACKSON, any law, custom, or usage to the contrary notwithstanding.

Resolutions. Among the resolutions, we notice one, requiring the Governor and Council to appoint a committee, for the pur-

pose of collecting information on the subject of the culture of silk; a resolution, appropriating $1200 for the purpose of educating indigent deaf and dumb children, at the Asylum at Hartford; and a resolution providing for the publication of a new edition of the laws of the state.

Virginia.

The General Assembly of this state, at the session commenced at Richmond, December 1st, 1828, passed one hundred and eighty-one acts, of which the seventy-three first are of 'a public and general nature;' and the remainder of 'a private and local nature.' The two houses also passed resolutions on five subjects.

Ch. 1. *Taxes.* This is an act for taxation for the year 1829. Most of the taxes are in the nature of excise duties. Among others we notice, for every slave above twelve years old, forty cents; for every license to keep a house of private entertainment, seven dollars for every hundred dollars of yearly rent or value; for every writ instituting a suit in a superior court of law, $1 50, and the same for every subpœna in a superior court of chancery; other law process is also taxed; for every license to sell merchandize by wholesale and retail, $60—by retail only, $20; license to sell lottery tickets, $300—in schemes authorized by the state only, $60; license to a broker, $60.

Ch. 14. *Literary Fund and Free Schools.* This act is in amendment of preceding acts on the same subjects. It contains provisions for dividing the counties into school districts; for defraying out of the funds two-fifths of the expense of school houses in any district where the inhabitants of the district raise three-fifths by voluntary contributions; and school commissioners are authorized to appropriate a sum not exceeding $100 a year, for the employment of a teacher in any district school house, provided the inhabitants of the district raise an equal or greater sum for the same purpose by voluntary contribution, provided that the school is made a free school for the instruction of 'every free white child within the district.'

Ch. 15. *Constitution.* An act to organize a convention to amend the state constitution.

Ch. 17. *Pauperism.* This act makes it the duty of the clerk, agent, or president of the board of overseers in each county in the state to report to the auditor of public accounts, all the information furnished by the records as to the number of the poor, the manner and annual expense of their maintenance from Jan. 1, 1800,

to the date of the report, to be given in a tabular form, which is prescribed in the statute, as follows:

Year.	The number of poor whites maintained at the public charge.	The number of free blacks maintained at the public charge.	The amount of poor rates levied annually for their support.	The amount of donations for the use of the poor from individuals or otherwise.	The number of poor maintained at poor or work houses, with the amount of the annual expense of their maintenance.	The number of poor boarded out or otherwise supported, with the am't. of the annual expense of their support.

A similar annual report is required to be made in all succeeding years.

Ch. 20. *Abatement of Suits.* No suit or motion of a *feme sole* plaintiff shall abate in consequence of her marriage, but may be prosecuted by her and her husband.

Ch. 24. *Bills and Notes.* The damages on foreign bills protested for non-acceptance or non-payment, are made ten per cent. The protest of a notary of any bill, note, or check, stating the time, place, and manner of presenting and of giving notice, verified by the oath of the notary, made before a justice of the peace of the state, the same or the next day, may be evidence of any suit founded on the bill, note, or check; unless the court is satisfied by the defendant's oath or otherwise, that the personal attendance or deposition of the notary is necessary to a fair trial or decision of the case.

Among the other public acts are one amending the laws relating to the penitentiary; two relating to slaves and persons of color; four to the revenue; seven to the terms and jurisdiction of courts; twenty-eight to elections in counties and towns; and two to the Kanawha Turnpike Road, and one prescribing the rate of tolls on the Kanawha River.

Private and Local Acts. The private and local acts comprise several in relation to companies for the improvement of the navigation of the rivers and other waters of the state; others in relation to companies for making turnpike roads; a company is also incorporated for building a bridge across the Potomac, and another for building a bridge across the Shenandoah at Harper's Ferry. [If we may judge from these acts the communication between the different parts of the state must be rapidly improving.]

Several lotteries are granted by the state, most of them for improving roads. [We cannot but regret that any of the states are still willing to sanction this most pernicious species of gambling. No object of public improvement will justify the sacrifice of the

morals and property of the people, which inevitably attend the raising of money by such means.] Four companies are incorporated for manufacturing cotton, wool, flax, and hemp. The largest of these companies is allowed a capital which is not to exceed one hundred thousand dollars. There are eleven acts in relation to schools and academies, and one granting a lottery for the benefit of an academy. Many of the acts relate to towns. Two acts grant divorces; and three allow the free persons of color respectively named in them to remain in the state.

The Constitution and the Tariff. A long preamble and six resolutions were adopted by both houses. The resolutions are to the following effect.

1. 'That the constitution of the United States being a federative compact between sovereign states, in construing which no common arbiter is known, each state has the right to construe the compact for itself.

2. 'That in giving such construction' 'each state should be guided, as Virginia has ever been, by a sense of forbearance, and respect for the opinion of the other states, and by community of attachment to the Union, so far as the same may be consistent with self-preservation, and a determined purpose to preserve the purity of our republican institutions.'

3. 'That this General Assembly of Virginia, actuated by the desire of guarding the constitution from all violation, anxious to preserve and perpetuate the Union, and to execute with fidelity the trust reposed in it by the people, as one of the high contracting parties, feels itself bound to declare, and it hereby most solemnly declares, its deliberate conviction, that the acts of congress, usually denominated the Tariff laws, passed avowedly for the protection of domestic manufactures, are not authorized by the plain construction, true intent and meaning of the constitution.'

4. 'That the said acts are partial in their operation, impolitic, and oppressive to a large portion of the people of the Union, and ought to be repealed.'

5. The fifth resolution requests the governor to communicate the preamble and resolutions to the executives of the several states, to be laid before their respective legislatures.

6. The sixth requests the governor to transmit copies of the report and resolutions to the senators and representatives of Virginia in congress, 'with a request to the representatives, and instruction to the senators, that the same be laid by them before their respective houses.'

Alabama.

At the session of the General Assembly of Alabama, commenced on the third Monday of November, 1828, at Tuscaloosa, one hundred and fifty one statutes and three joint resolutions were

passed; and six joint memorials were adopted. Of the statutes twenty-six only are public. The acts are not numbered.

Sheriffs. Sheriffs and other officers are authorized to require of the party in whose favor any attachment is issued, a bond of indemnity to secure them, in case it should afterwards appear that the property levied on by them does not belong to the defendant in attachment. p. 12.

Sheriffs, and other officers, whose duty it is to make return of elections, who wilfully neglect to make such returns, within the time prescribed by law, are to forfeit the sum of $500. p. 57.

Justices of the Peace and Constables. They are not to exercise the powers incident to their offices, after they have moved 'out of the captain's *beat* in which they have been elected,' under penalty of forfeiting the sum of $40 for every offence. But this statute is not to be construed to apply to the justices of the peace and constables of Mobile, who leave the city during the summer for their health. p. 79.

Jurors. In all actions brought for the recovery of any penalty, of which the whole or a part enures to the county in which any such actions is brought, the defendant is not to be permitted to except to the competency of any juror, on account of his residence in such county. p. 58.

Penal Statutes. When a penalty is incurred, by reason of the violation of any statute, if such statute does not prescribe the mode for the recovery of it, and the use to which it is to be applied, the penalty is recoverable by action of debt, in the courts of the county wherein the penalty has been incurred, brought jointly in the name of such county, and of the person suing for the same; one half is to enure to the county for the use of the poor thereof; and the other half to the person so suing. p. 44.

Trustees. If it appear upon trial before the Circuit Court, that any trustee has wasted or is about to waste the trust estate, the court may require bond of him for the faithful management thereof: and on his failure to give such security, he may be removed. All trustees by will or deed are required to render to the Circuit Court once a year, an account of the situation and management of the estate; on failure so to do, they are to be removed. p. 13.

Guardians. Guardians, residents of the state, are authorized to bring into the state the slaves of their wards, and to hire them out; provided they comply with the laws on the subject of guardians and wards. p. 70.

Ferries. The County Courts are authorized to establish ferries over small rivers, and to require bonds that they shall be kept in good order and properly attended, whenever the rivers cannot be otherwise safely passed. p. 34.

Endorsers. This act repeals so much of a former act as authorizes the assignee or endorsee to maintain a joint action

against 'the maker and endorser of any bond, obligation, note, or other contract in writing.' Suits thereon against the makers and obligors, when the sum due does not exceed fifty dollars, are to be brought within thirty days after the same are payable, or 'if they are endorsed after becoming due, within thirty days after the endorsement, unless the endorser or assigner consent in writing, that a further time may be given to the maker or obligor, or unless the maker or obligor is absent from the place of his residence, or residence unknown, or unless the assigner or endorser require in writing the assignee or endorsee to bring suit immediately after the maturity of the bond, note, or other instrument in writing, or if endorsed after the same become due, immediately thereafter; in these cases, the endorsee or assignee shall commence suit within five days thereafter;' and no assigner or endorser is to be liable, unless suits are brought within the time prescribed by law. When judgment is recovered by the assignee or endorsee against the maker or obligor, and a writ of *fieri facias* is 'returned by the proper officer "no property found," the assignee or endorsee may commence his action against the assigner or endorser,' and the return on the writ is to be 'sufficient evidence of insolvency of the maker or obligor to authorize a recovery against' the assigner or endorser. p. 59.

Slaves. This act repeals 'An act to prohibit the importation of slaves into this State for sale or hire,' passed January 13, 1827. p. 63.

State Revenue. Auctioneers are required to forward to the Comptroller of Public Accounts a statement of all sales subject to duties, every year; the statement to be accompanied with an affidavit of the auctioneer, his clerk or agent, that it is a correct duplicate of the statement furnished the tax collector. If any auctioneer neglect so to do, he is to forfeit the sum of $1000; the certificate of such neglect by the Comptroller, is to have the effect of an execution, and the tax collector is to satisfy the same out of the property of the auctioneer or his securities.

If any assessor fail to return his tax list to the Comptroller at or before the time by law prescribed, he is to forfeit the sum of $1000; and the Comptroller's certificate of such failure, directed to the sheriff of the county, is to have the effect of an execution. The assessor forfeits a like sum 'for each succeeding month during which he may be a defaulter.'

Assessors and tax collectors, if re-elected, are to present receipts in full for the taxes of the preceding year, together with their bonds, for approval, to the judge of the county court; otherwise, he is to declare their offices vacant. p. 55.

Creek Indians. Sec. 1. The territory of the Creeks is annexed to the counties of St. Clair, Shelby, Montgomery, and Pike.

Sec. 2. The jurisdiction of the circuit courts of those coun-

ties is extended over their respective limits as established by this act.

Sec. 3. The jurisdiction of the orphans' court and courts of revenue, of these counties is to be extended over so much of their respective limits as now constitutes a part of the Creek nation, after March 1, 1830.

Sec. 4. Persons are to be appointed in each of those counties, for the purpose of taking a census of the Indian population, and of their slaves.

Sec. 5. This section provides for the compensation of the persons so appointed.

Sec. 6. Nothing in this act is to be construed 'to impose taxation or militia duty on the Indians, until the same be specially authorized by the State Legislature.'

Sec. 7. The sheriffs of said counties, for the service of any process in the Creek nation, are to 'be entitled to such compensation, as the presiding judge of the circuit court to which such process is returnable shall certify at the trial, is just and proper, and the same shall be taxed in the bill of costs.'

Sec. 8. The secretary of state is required to 'furnish the agent of the Creek Indians, and each of our senators in congress with a copy of this act.' p. 65.

Salaries. By the act for defraying the expenses of the government, for the year 1829, the following appropriations are made; for the salary of the Governor, $2000; Secretary of State, Comptroller, and Treasurer, $1000 each; Judges of the Circuit Courts, $1750 each; Attorney General, $425; State Printer, $2500; State Architect, $1749. The sum of $2000 is appropriated as a contingent fund, subject to the governor's draught. p. 76.

Joint Resolutions. Amendment of the Constitution of the State. By this resolution an amendment of the constitution is proposed, providing that 'the judges of the several courts shall hold their offices for the term of six years; and for wilful neglect of duty, or other reasonable cause, which shall not be sufficient ground for impeachment, the Governor shall remove any of them, on the address of two thirds of each house of the General Assembly.' The cause of the removal to be stated at length in the address and entered on the journals of each house. But every judge, so intended to be removed, is to be heard in his defence, before any vote for such address shall pass; and the vote is to be taken by yeas and nays. p. 94.

Tariff. A joint resolution was passed relative to the tariff of 1828. This tariff is declared to be unjust, impolitic, unconstitutional, &c. It is resolved that the legitimate mode of opposition is by remonstrance, till argument is exhausted; that open resistance should be the last and desperate alternative between sub-

mission and liberty; and the senators of the state in congress are instructed to record on the journals of that body a solemn protest against it, in the name of the state of Alabama. p. 101.

Joint Memorials. Joint memorials were adopted, addressed to congress, asking relief for the purchasers of public lands, an extension of the 'Circuit Court system of the Federal Judiciary to the Western and South Western States,' and a cession of the unappropriated land in Alabama to the state, for the purposes of internal improvement and education.

Private Acts.

Among the private acts we notice eleven acts of divorce; fourteen acts authorizing the emancipation of slaves, provided that the persons so emancipating them, enter into bonds that the slaves shall never become chargeable to the state, or any county, town, or city; three acts for the legitimation of certain persons; three acts for the restoration of the rights of citizenship to persons convicted of offences against the laws; an act to relieve a person from the disqualifications, created by the laws for the suppression of duelling, and providing that in all cases where it may be necessary for him to take the oath prescribed by the act passed January 7, 1826, amending the several acts against this crime, it 'shall be so administered as to permit him to swear that he has not violated any of the provisions of said act, since January 1, 1828;' an act authorizing a sum of money to be raised by a lottery, for the purpose of erecting a masonic hall, for the use of 'Rising Virtue Lodge, No. 4,' and providing that if prizes are not applied for, within ninety days after the drawing thereof, they shall be deemed donations to the Lodge; four acts incorporating trustees of Academies; an act incorporating an agricultural society; an act incorporating 'The Montgomery Wharf and Steam Boat Company,' the stockholders of which are individually liable for the amount of their shares; and an act incorporating 'The Mobile Marine Railway and Insurance Company.'

INTELLIGENCE.

Rights of Slave Holders. We have seen an opinion of Judge Morris, of Indiana, with regard to the rights of an owner of slaves. The question arose on a habeas corpus, brought in Marion county, December 23, 1829, by the slaves of one Sewall. The return stated that the slaves belonged to Sewall, and were raised in Virginia, and by the laws of that state were held to labor to him; and that Sewall was emigrating from Virginia to Missouri, with his family and his slaves, and that his route led him through Indiana.

'It appeared from the evidence adduced, that about the 10th of this instant, (December, 1829) William Sewall, the claimant, with his family and the petitioners, came to the house of a Mr. Stoops in this county, and tarried a number of days on account of high waters. He uniformly stated, when interrogated upon that subject, that he had formerly resided in Virginia, and that he was on his way to the state of Illinois, where he intended to settle. He told one witness that he would not again reside in a slave state; and on being asked, said he did not know whether the black woman was going to live with him or not. He told another witness that he was going to settle in Illinois, and run his negroes into Missouri for the purpose of selling them.'

Other evidence was produced which also tended to show that Sewall's destination was Illinois. The following extracts from the opinion of Judge Morris, will show his decision and the grounds on which it rested.

'The third clause of sec. 2, art. 4, of the constitution of the United States provides that, "no person held to service or labor in one state under the laws thereof, *escaping into another*, shall in consequence of any law or regulation therein, be discharged from such service or labor; but shall be delivered up on the claim of the party to whom such service or labor may be due." The 3d section of an act of Congress, approved February 12, 1793, provides, "That when a person held to labor in any of the United States or Territories, under the laws thereof, *shall escape into any other* of the said states or territories, the person to whom such labor or service may be due, his agent, or attorney is hereby empowered to seize such fugitive from labor and take him or her before any judge of the circuit or district courts of the United States, residing or being within the states, or before any magistrate of a country, city, or town corporate, wherein such arrest or seizure shall be made, and upon proof to the satisfaction of such

judge or magistrate, either by oral testimony or affidavits taken before and certified by a magistrate of any such state or territory, that the person so seized or arrested doth, under the laws of the state or territory *from which he or she fled*, owe service or labor to the person claiming him or her, it shall be the duty of such judge or magistrate to give a certificate thereof to such claimant, his agent or attorney, which shall be sufficient warrant for removing the said fugitive from labor to the state or territory *from which he or she fled.*"

'Under these several rights the parties now before me are claiming, on the one hand, a certificate to authorize the removal of the petitioners, and on the other, to be discharged from custody. * * *

'The state tribunals are bound to take notice judicially of the several states wherein slavery is tolerated, because its existence is recognised by the constitution and laws of the United States; otherwise, the claimant of a fugitive from service would be required to produce an authenticated copy of the constitution, and also of the laws of his state, which authorize and regulate slavery. So also, as a necessary consequence, are courts bound to take notice in which of the states slavery is prohibited.

* * * *

'The claimant, in his return to the writ, says, that the petitioners were born and resided in the state of Virginia, and that by the laws of the said state "they *were held to labor* to the undersigned:" That about six weeks since he left Virginia with his family and slaves to emigrate to Missouri, and in passing through this state on his way he was casually detained, when his slaves left him. If the point of destination had not been fully proven to be Illinois instead of Missouri, (so far as such a fact could be proven by a man's uniform and repeated declarations,) the case would have presented a question more difficult as to principles, and more delicate when viewed as to its consequences, than the one now presented. The right of individuals, other than *citizens of slave states* to pass through our limits, and while sojourning among us to exercise rights which are denied to our own citizens, and which are incompatible with the fundamental principles of our government, is no where expressly or impliedly granted by the national compact. Our constitution has prohibited the existence of slavery within the state, in the strongest and most emphatic terms; and no one will question the right of its framers to make the prohibition. *(See the opinion of the Supreme Court in the case of Polly* v. *Lasselle.)* (*a*)

'(*a*) In the above opinion no direct allusion was made to the ordinance of congress for the government of the North Western Territory, because it was thought that the adoption of our constitution, with provisions directly in accordance with the terms of the compact, superseded the necessity of recurring

'It is impossible to make a distinction between slavery in the state, and carrying a negro from place to place within the state against his will. Indeed slavery does not consist in any particular employment, but in any and every control of the person of the individual against his will.

'The claimant has voluntarily relinquished his citizenship in Virginia, and brought his slaves with him, with the purpose and intention of settling in a free state; and in passing through this state with the petitioner, they have left him and asserted their natural rights. (*a*) In what character then, or by what right can he claim? He cannot as a citizen of Virginia, because he no longer sustains that character. He cannot claim them as having *escaped from the state* by the laws of which they owed service, because their leaving the state was his own act. It would be folly to say that he has brought himself within the exception in favor of the claimants of fugitives from labor. * *

'I cannot conceive how the language of the above provision of the constitution of the United States can be tortured to secure the right of reclaiming, unless the slave has *escaped from* the state where he owes service, or from the possession of his master who is a citizen of such state. The act of congress above quoted, which may be said to be a congressional interpretation of that clause, abundantly sustains the view I have taken. The claimant is authorized to arrest only when the slave has *escaped from* the state where he owes service, into another state;—he must prove that the fugitive *owes service* under the laws of the state *from which he fled*, and the certificate of a judge or magistrate can only authorize his removal back to the state *from which he fled.*

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to the compact itself. But it has since occurred to me that as the articles are declared to be a "compact between the original states and the people and states in the original territory, and forever to remain unalterable," they are the guaranty of our political rights; and that all persons are bound to take notice of its stipulations. The sixth article stipulates that "there shall be neither slavery or involuntary servitude, in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted: Provided always, that any person *escaping into the same*, from whom labor or service is lawfully claimed in any one of the original states, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her service as aforesaid." The court of appeals of Kentucky (see 2 Marshall's Rep. 471,) say, "the words of the ordinance are extremely clear and forcible, '*there shall be neither slavery or involuntary servitude*,'" a strong mode of expressing that every inhabitant shall be free. If then a slave *could exist or reside in the territory, and be there a slave*, the ordinance could not be true.'

'(*a*) It has been decided in Maryland and Kentucky, that when a man carries or sends his slave into a free state and there hires or employs him, the slave thereby acquires his freedom. In the case of negro David *v.* Porter, 4 Harris & M'Henry's Rep. 418, the owner hired the negro to a citizen of Pennsylvania. The negro afterwards returned to Maryland into the possession of the claimant; and on petition, the general court decided that the hiring into Pennsylvania entitled the negro to his freedom. See also 1 Bibb. Rep. 425.'

'If I should now grant the claimant a certificate, could I say, it satisfactorily appeared that the petitioners, according to the laws of the state of Virginia, now owe him service? Certainly not, because by his removal from that state he has abandoned the protection of its laws. Or if this absurdity could be removed, could the certificate authorize their removal to Illinois, where I am bound to take notice that slavery is not tolerated? This would be still more absurd, because they must be removed to the state *from which they fled.*

'The same rule that requires me to take notice that the laws of Virginia tolerate slavery, requires me to know that in Illinois it is prohibited. The comity due from us to Illinois, is not less than that which we owe to Virginia.

'By the law of nature and of nations, (see Vattel 160,) and the necessary and legal consequences resulting from the civil and political relations subsisting between the citizens as well as the states of this federative republic, I have no doubt but the citizen of a slave state, has a right to pass, upon business or pleasure through any of the states, attended by his slaves or servants; and while he retains the character and rights of a citizen of a slave state his right to reclaim his slave would be unquestioned. An escape from the attendance upon the person of his master, while on a journey through a free state, should be considered as an escape from the state where the master had a right of citizenship, and by the laws of which the service of the slave was due. It is not necessary for me to decide whether an emigrant from one slave state to another would have the right of reclaiming his slaves if they should escape from him while passing through our state, because that is not the case now before me. * * The emigrant from one state to another might be considered prospectively as the citizen or resident of the state to which he was removing; and should be protected in the enjoyment of those rights he acquired in the state from which he emigrated, and which are recognised and protected by the laws of the state to which he is going. But this right I conceive cannot be derived from any provision of positive law.(a) * * *

'The petitioners must be discharged.'

We have seen, in the Indiana Journal of January 27, 1830, the argument of Sewall's counsel.

'(a) Since this opinion was given I have met with a case in the appellate court of Kentucky, 2 Marshall's Rep. 477, 478, where this identical point was considered by the court upon similar grounds, but the court never refer to the constitution or laws of the United States as the foundation of the right. If those who have felt dissatisfied with the notice I took of the *intention* of the claimant, will take the trouble to examine the passage just referred to, they will find that the court seem to have attached at least as much importance to the intentions, as I have done.'

Written Votes. A clause in the constitution of Massachusetts provides that 'every member of the House of Representatives shall be chosen by written votes.' The supreme court of that state has recently decided, in the case of Henshaw *v.* Foster, that *printed* votes are '*written*' votes, within the meaning of the constitution. The correctness of this decision, we presume, will not be questioned, although it had been for a long time the practice to have all votes written. The opinion of C. J. Parker has been published in the papers, but we do not give any extracts, as it will hereafter appear in the Reports.

Law Reforms in England. The following account of what is doing on this subject is taken from the Law Magazine.

'Of the Common Law Commission we have only to say, that a Report on Pleading is nearly if not quite ready, and will be delivered at an early period of the ensuing session of parliament; and that it is commonly understood that the forms now in use will be very greatly curtailed.

'The Real Property Commissioners are almost exclusively occupied with the question of Registration. On this subject a great deal of evidence has been taken already, and a great deal more is to be procured before the precise plan will be definitively agreed on. That a registry of some sort or other will be recommended, seems certain. The drawing up of the report on this subject has been entrusted to Mr. Tyrrell, whose fitness for the undertaking is sufficiently shown by his suggestions. The official plan, reprinted in this number, was, we believe, compiled from several sources, and put into its present shape by Mr. Duval. With regard to the time when this report will appear, nothing certain can be predicated at present; the commissioners being particularly anxious to have the opinions of mercantile men and landed proprietors, as well as of the profession, and contributors of this sort are not so easily procured. Judging from the quantity of work to be done, we do not expect it much before the end of the session.

'At this rate it will naturally be asked, how long are these commissions to last?—a question to which, we freely admit, we cannot give a satisfactory reply. The Common Law Commissioners prefaced their inquiry, by stating that they had classed the matters submitted to them under twelve general heads, two of which they disposed of in their first report. Since Messrs. Duval, Saunders, and Tyrrell were added to the other commission, the law of real property has been subjected to a similar division; and, to the best of our information, the number of heads (excluding Registration) is the same. There is, however, one material distinction. Two, or three, or even more of the heads under which

the Law of Actions has been classed, may be included in a single report; but the twelve grand divisions of Real Property are much too large to be amalgamated; indeed, it is not unlikely that some of them will need subdivision, or that supplemental reports will be required. Allowing, then, that the Common Law Commissioners may finish their task within three years (at present, we believe they anticipate a more speedy conclusion), we do not expect, considering the more unmanageable nature of the subject matter, that the Real Property Commissioners can finish under ten or twelve.

'Our precise object in making this calculation will presently appear, and we ought to add, that, in making it, we assume that the business will be carried on as briskly as hitherto. This, however, is any thing but sure. One member of the Common Law Commission, who might have been, though he was not, an effective one, has been virtually removed from it already. The elevation of Mr. Serjeant Bosanquet, who *is* all that Mr. Justice Park might have been, is said to be impending; and the well-earned reputation of Mr. Patteson and Mr. Serjeant Stephen, forbid us to reckon upon them as fixtures; whereas, though the Real Property Commission may lose its head, the conveyancers, or even the equity practitioners upon it, are not very likely to move. Nor is this the only disadvantage under which, comparatively speaking, the Common Law Commissioners are laboring. Their zeal, we believe, has outrun the zeal of the ministry, and they seem in a fair way to need the aid of Mr. Brougham to keep them, as he set them moving.

'Their call for 100,000*l.* a year for compensation money, has been by no means well received at the treasury; a new palace being of much more consequence just now than a new *capias* or *latitat*. The judges, too, it is said, do not approve the proposed amendments relating to bail. The Attorney-General, from a natural, if not commendable partiality, does not like to see the northern circuit impaired in lustre by division; and a persevering stand will probably be made in parliament on behalf of the judicial dignitaries of Wales. * * *

'When the first batch of Real Property Commissioners was announced, consisting, as our readers well know, of two eminent, but not first-rate, conveyancers; two equity practitioners, who however distinguished, could not have devoted an undivided attention to the subjects submitted to them; and a nisi prius advocate (a very clever one undoubtedly) for president; nearly all the old school of conveyancers, including most of the celebrated names in that department of law, were loud in their expression of mortification and disgust; and these feelings, we are sorry to say, they thought fit to manifest after a fashion which cannot be too severely reprobated. They met, we hear, in solemn conclave;

and not merely resolved on yielding no effective assistance themselves, but on preventing, so far as in them lay, the good intentions of others. Their scheme was counteracted by the general good sense and good feeling of the class of which these gentlemen have been reputed the chiefs; but not before they had undergone the disgrace of *instituting a personal canvass* for the furtherance of their patriotic designs. We knew this long ago, and it more than justifies the exposure which sundry learned contributors to the Appendix have experienced at our hands; one, it will be recollected, of their avowed modes of crippling the exertions of the commissioners being, the giving in of inconclusive and puzzling replies. The gentleman who has gone the greatest length in this way, has recently condescended to say that he thought the inquiry a piece of foolery, and that he went to play his part with the rest. *Credat Judæus*,—but if it be so,h e certainly played his part to admiration. To prevent mistakes, it is but fair to add, that we have no grounds for believing that Mr. Preston went further than joining in the resolution not to aid the commissioners. He has, however, drawn up an act of a sufficiently innovating character to render nine-tenths of Coke upon Littleton useless; but it has been intimated on his behalf to the government, that they must make up their minds to have all or none; to adopt his suggestions, verbatim, or do without him altogether; which, he firmly believes, they will not be mad enough to try. We are stating facts, and speaking seriously; and we must stand excused for adding a hope that this, decidedly the most erudite and experienced conveyancer of his day, may yet awake to the impropriety of refusing to contribute to a great national object, except on wholly inadmissible terms. With this, and perhaps another exception or two, the dissentient party has come round; the solemn league and covenant is broken; the holy alliance is dissolved. But another is forming, or formed, to crush in its more matured state what it was found impossible to nip in the bud. All the law lords are hostile to change, with the exception of the lords Plunkett and Lyndhurst; the first of whom has turned sulky, because he cannot get the Irish Chancellorship, and he refuses, on that account, to come over and help; whilst the latter candidly avows himself to be a very lazy fellow, not particularly well versed in the laws of Real Property and with a great disinclination to cram: 'Here I am (he says, like Sheridan),(*a*) tell me what to say, and I will say it: but my own opinion is, that we must make up our minds to wait till some of these old humbugs drop off.' He thus falls in with the views of

(*a*) 'He has been known to say frankly to his political friends, when invited to take part in some political question that depended on authorities, "You know I'm an ignoramus; but here I am; instruct me, and I'll do my best."—*Moore's Sheridan*, p. 377.

the enemy—we might well say the arch-enemy—Lord Eldon, by whom the main battalion, the *heavy* troops and *mercenaries*, will be led.

'His sagacious Lordship has got hold of and intends making a stand on the following passage, in the commencement of the report:—

"The whole law of Real Property is so connected, that alterations to be recommended in one branch cannot be definitively arranged without an understanding as to the manner in which others are to be regulated; and if any legislative measures are to be founded upon our suggestions, it may be expedient that they should all be brought forward at one time, as part of a systematic reform."

'There is, unhappily, the same want of precision about this paragraph as we have been so often compelled to point out in the course of our analysis of the report. The commissioners have expressed *two* inconsistent opinions, in endeavoring to reiterate *one;* and it is impossible to decide whether, according to their opinion, a single set of propositions may be passed into laws, so soon as we have a sufficiently clear understanding of the manner in which others are to be regulated; or whether we are bound to wait, not merely till the way appears clear, but till all legislative measures, founded upon their suggestions, are in a state to be brought forward at once. For instance, we now know enough of the sort of remodelling the system requires, to be quite sure that such of the suggestions in the first report as are worth adopting at all, may be safely adopted at once. Accordingly, therefore, as the above paragraph shall be understood, we may live ten, twelve, or fifteen years, under our present laws of Inheritance, Dower, Curtesy, Fines and Recoveries, Limitation and Prescription; or may bid adieu to them in 1830. Lord Eldon, of course, insists on the procrastinating sense; and, as parties are constituted, he may carry the point. Now, the mere forms of Fines and Recoveries have been shown to cost about 70,000*l.* a year, over and above what deeds operating in the same manner, would cost; and a round sum must be allowed for the litigation which doubts on these assurances are yearly occasioning. It is thus made manifest that in this article alone, a confused paragraph may cost us a million. For our own parts, we are so well convinced of his Lordship's aptness at being not merely doubtful himself, but the cause of doubts in others, that we have already made up our minds to the delay; but we do not, on that account, despond. Our great law-lords may do their worst; but they may depend upon it, *le bon temps viendra;* and they *must* move on with the rest:—

"If you give way,
Or budge aside from the direct—forthwith,

> Like to an untir'd tide, they all rush by
> And leave you hindmost,
> Or, like a gallant horse, fallen in first rank,
> Lie there for pavement to the abject rear,
> O'errun and trampled on :—"

'Or, to repeat the same sentiment in the energetic language of Bossuet—and can it be repeated to these lagging people too frequently—"La loi est prononcée; il faut avancer toujours. Je voudrois retourner sur mes pas; *Marche, marche.* Un poids invincible nous entraine, il faut sans cesse avancer vers la precipice. On voudroit arreter.—*Marche, marche.*"—(Sermon sur la Resurrection).'

Lord Redesdale. The Law Magazine gives the following notice of this distinguished Judge.

'John Freeman Mitford was born Aug. 18, 1748; not 1741, as all the papers have stated; neither was he, we learn from pretty good authority, intended from the first for the bar. He was a clerk in the Six Clerks' Office before he resolved on devoting himself to the higher branch of the profession; and, in this particular, the early part of his life coincides with that of Sir Samuel Romilly. He entered at Lincoln's Inn, and devoted himself to the Court of Chancery; and in 1782 he published "A Treatise on Pleadings in Suits in the Courts of Chancery by English Bill." We are not aware what extent of practice he possessed before the publication of this admirable work, but we find him enjoying a first-rate practice soon after it appeared, and jointly with Lord Eldon, leading in the Court of Chancery. We shall leap over the intervening space, during which he became successively King's Counsel, Welsh Judge, Member of Parliament (1789), and Solicitor General (Feb. 1792), and come at once to the prosecution of Horne Tooke for high treason in 1794, when Lord Eldon, (then Sir John Scott) as Attorney General, and Lord Redesdale, (then Sir John Mitford) as Solicitor General, conducted the case for the crown. On this occasion Lord Redesdale distinguished himself, not only by his forensic exertions, but by a singular display of sympathetic emotion. Tooke had been making some pretty strong insinuations against the Attorney General's integrity, which the party assailed thought it necessary to repel. He accordingly expatiated at some length on the value of character, and the excellence of his own: "He could endure any thing but an attack on his good name; it was the *little patrimony* he had to leave to his children; and, with God's help, he would leave it unimpaired." Here his voice faltered, and he burst into tears; and, to the surprise of every one, the Solicitor General became equally affected, and wept as profusely as his friend. "Do you know," said Tooke, in a loud whisper to a

bystander, on finding this bit of pathos likely to tell against him,—"do you know what Mitford is crying about? He is crying to think of the *little patrimony* Scott's children are likely to get."

'We have nothing else to tell about this trial which is not probably well known, or much too long to repeat; neither can we venture to particularize the more celebrated speeches which he made in support of Mr. Pitt's administration; a long list of which might easily be formed from the debates. He was named Attorney-General in the summer of 1799, on Lord Eldon's being raised to the peerage and named Chief Justice of the Common Pleas. Under Lord Sidmouth's administration (in 1801) he filled the situation of Speaker of the House of Commons; and in 1802 succeeded Lord Clare as Chancellor of Ireland, and was elevated to the peerage by the title which he held at the time of his death. It seems, according to the somewhat apocryphal authority of Barrington, that his Lordship was rather out of his element on his arrival amongst the wits of the Irish bar; and a humorous account is given of his efforts, at his first dinner party, to chime in with the tone of the company. "His Lordship had obviously got together some of his best bar-remarks (for of *wit* he was totally guiltless, if not inapprehensive), to repeat to his company, as occasion might offer; and if he could not be humorous, determined at least to be entertaining. The first of his Lordship's observations after dinner, was the telling us that he had been a Welsh judge, and had found great difficulty in pronouncing two double consonants which occur in the Welsh proper names. 'After much trial,' continued his Lordship, 'I found that the difficulty was mastered by moving the tongue alternately from one dog-tooth to another.' Toler seemed quite delighted with this discovery; and requested to know his Lordship's dentist, as he had lost one of his dog-teeth, and would immediately get another in place of it. This went off flatly enough, no laugh being gained on either side. Lord Redesdale's next remark was,—that when he was a lad, cock-fighting was the fashion; and that both ladies and gentlemen went full dressed to the cock-pit, the ladies being in hoops. 'I see now, my Lord,' said Toler, 'it was then that the term *cock-a-hoop* was invented.' A general laugh now burst forth, which rather discomposed the learned Chancellor. He sat for awhile silent; until skating became a subject of conversation, when his Lordship rallied—and with an air of triumph said, that in his boyhood all danger was avoided; for, before they began to skait they always put blown bladders under their arms; and so, if the ice happened to break, they were buoyant and saved. 'Ay, my Lord!' said Toler, 'that's what we call *blatheram-skate*(*a*) in Ireland.' These do no dis-

(*a*) An Irish vulgar idiom for *nonsense*.

credit to Sir Jonah's invention; but there is a much better, and (if that be material) a well authenticated story of his Lordship's inaptitude for joking: "A cause was argued in Chancery, wherein the plaintiff prayed that the defendant should be restrained from suing him on certain bills of exchange, as they were nothing but *kites*. "Kites?" exclaimed Lord Redesdale:—Kites, Mr. Plunkett? Kites never could amount to the value of those securities? I don't understand this statement at all, Mr. Plunkett." It is not to be expected that you should, my Lord," answered Plunkett: "In England and in Ireland, kites are very different things. In England, the *wind* raises the *kites;* but, in Ireland, the *kites* raise the *wind.*" "I do not feel any way better informed yet, Mr. Plunkett," said the matter-of-fact chancellor. His Lordship continued in the Irish Chancellorship about seven years; his decisions are contained in the reports of Messrs. Schoales and Lefroy; a book, we need hardly add, of high authority in the courts both of England and Ireland. His chef-d'œuvre in legislation is commonly supposed to have been the introduction of the insolvent laws, which this, assuredly, is not the place to discuss. The principle may be good, but it has hitherto been most injuriously applied; and nothing can be more vague and unsatisfactory than the last act upon the subject. His Lordship died January 23, 1830, and was succeeded in his title and estate by his son. Our readers are aware that he was the brother of the historian of Greece; a memoir of whom, by Lord Redesdale, appeared in the last edition of the History.'

Mr. Justice Burrough. The following is also from the Law Magazine.

'As Mr. Justice Burrough has signed his resignation, though, at this present writing, ostensibly a judge, we may consider him within our jurisdiction. We do not know the place or date of his birth, but his family, we believe, are established in Hampshire. He had not the advantage of a university education; nor, indeed, was he ever remarkable for learning or literary acquirement; though this may be attributable in some measure to the close attention he paid to special pleading; a branch of practice pursued by him for several years before he was called to the bar. On being called, he attended the Hampshire sessions and western circuit; and he has been heard to say that his profits, at a single sessions, often exceeded one hundred guineas. He held a high rank on the western circuit, though he never arrived at the dignity of leader. In 1816, he was raised to the bench; where he continued to distinguish himself, as before, by a profound knowledge of certain branches of law, particularly of special pleading; and by the kindness and simplicity of his demeanor. It is said, that, upon his elevation, he made it his formal request

to the bar, that they would not call him "Jemmy" in court. He was, it may be easily supposed, extremely averse from the least shadow of affectation; of which some amusing instances are told. The following may pass for a specimen: A man was tried before him for stealing a pair of breeches. The prosecution was conducted by a young barrister, who, seeing a female witness in the box, and the court crowded with ladies, thought proper to speak of the stolen garment as *inexpressibles*. "*Inexpressibles!*" said the judge, "inexpressibles—I don't find any mention of such a thing in the indictment." "Why no, my lord," simpered the counsellor; "I thought my lord, it might be as well"—(and here he winked and nodded, in the vain endeavor to inspire the judge with the same regard for propriety); "the indictment mentions *breeches*." "Then why couldn't you say breeches at once? Here, Mr. Undersheriff, please to hand them up to the lady. Now, ma'am, are you ready to swear that those are your husband's breeches?" His mode of illustration was also remarkably quaint. We once heard him begin an address to a jury in this manner: "Gentlemen, you have been told that the first is a *consequential issue;* now, perhaps, you don't know what a consequential issue means; but I dare say you understand ninepins. Well, then, if you deliver your bowl so as to strike the front pin in a particular direction, down go the rest; just so is it with these counts; knock down the first and all the rest will go the ground; that's what we call a *consequential issue*." Mr. Justice Burrough was always rather popular with the bar; his chief fault being the remaining too long upon the bench; and as he is not likely to commit that fault again, we shall say nothing more about it. A facetious Ex-Baron of the Exchequer complains, that Mr. Justice Burrough's conduct was rather hard upon him; as he was induced to resign by the constant allusions of the press to the improper continuance of superannuated judges on the bench, which, though they now appear to have been aimed at his learned brother, he all along considered to have been intended for himself.'

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[The editors of the Themis speak in high terms of this work, as a history of legislative institutions and legal science since the twelfth century, and the causes which have promoted and obstructed their progress.]

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[The editors of the Themis say that they had expected a particular notice of this work from the pen of M. Dumont, the celebrated editor of Bentham's works, or rather the compiler of sundry works on legislation, for which he was supplied with materials by Mr. Bentham, but his decease has defeated this expectation. They speak of this work as one of the most important of those published for these many years on the subject of Penal Laws.]

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INDEX.

A.

Admiralty jurisdiction of United States Courts, extends to bills of lading and charter parties, 29; enforcing maritime liens, 31.
Alabama, recent legislation of, 399.
Appropriations, in Illinois, 145.
Athens, Maritime Loans in, 248.
Attachment law in Maine, 391.

B.

Bail, in Illinois, 149.
Bankrupt and Insolvent Laws, remarks upon 201; of France 219; of England 222.
Banks, in Pennsylvania regulated, 144.
Bellingham, Governor's will, 243, n.
Betterments in Illinois, 149.
Bills, damages on in Virginia, 398.
Black law of Illinois, 149.
Blair's Digest of Probate Laws of Massachusetts, reviewed, 237.
Boeck, Augustus, Professor at Berlin, 248, n.
Bottomry and Respondentia at Athens, 248.
Burrough Mr. Justice, biographical sketch of, 414.

C.

Canal in Illinois, proposed, 146.
Census of Illinois, 146.
Chancery courts in Illinois, 147.
Charter party, where charterers have possession of ship, the ship owner has no lien on cargo for the freight, 32.
Chose in action, when assignee may sue in his own name, 333.
Colonial laws of Massachusetts, continued in force after the colony charter was annulled, 115 to 121; 241.
Coroners in New Hampshire, 394.
Courts in Maine, 390.
Creeks, Alabama statute declaring their territory to be annexed to the State, 401.
Criminal, law in Pennsylvania, 143; in Maine, 392.
Criminal law. See *Medical Jurisprudence, Insanity produced by Intemperance.*

D.

Damages in actions *ex delicto*, reading on, 287.
Day Thomas, review of his Connecticut Reports, vol. vii. part 1, 337; a skilful and faithful reporter, 337; digest of decisions in, 352.

Deaf and dumb person, trial of a, 158.
Debtor and creditor, laws of, 201.
Deed, opinion of David Hoffman on the construction of one, 65 to 86; acknowledgments of, regulated by Illinois statute, 147; registry in Illinois, 147; covenants implied in Illinois, 150; laws respecting deeds in New Hampshire, 395.
Delirium tremens. See *Insanity produced by Intemperance.*
Digest of Recent Decisions, 122; 352.
Divorces, legislative objected to, 180; governor Shultze's opinion, 180; in Maine, 392.
Dower, law of, in New Hampshire, 395.
Drew captain, tried for murder, 7.

E.

Elections regulated in Illinois, 147.
Electors of President, Pennsylvania law respecting, 142.
Executions in Illinois, 148.
Executors, statute in Pennsylvania relating to, 142.
Executors and administrators, in Maryland, 153.

F.

Feme sole's marrying does not abate her suit in Virginia, 398.
Foreign attachment regulated in Maine, 391.
Frauds, statute of, what a signing within, 329.

H.

Habeas Corpus. See *Seaman.*
Harris & Gill, review of their reports, 314; commended, 316; repetitions in, 317; some cases on construction of facts too long, 318; digest of decisions in, 352.
Hoffman David, an opinion by him on the construction of a power of attorney and of a deed, 52 to 86; review of his Legal Outlines, 86 to 100; introductory part not sufficiently connected with main subject, 86 to 88; opinions as to *state of nature*, 88 to 90; natural rights, 90; origin of society, &c. 91 to 93; discusses question whether revolution reduces members of a community to a state of nature, with ability, 93; extract on this subject, 94; ex post facto and retrospective laws, 94, 95; opinion on codification, 95, 96; extract respecting conflict of laws, 95 to 98; extract on abolition of territorial jurisdiction of barons in France, 98 to 100; work recommended, 100.

I

Idiots and lunatics, Illinois statute, 148; Maryland statute, 152.
Illinois, legislation of session of December, 1828, 145.
Inner Temple, new regulations proposed in, 174.
Indians Creek, statute of Alabama, declaring their territory to be annexed to counties of the state, 401.
Insanity produced by intemperance, person not responsible for acts done under influence of, 7; case of captain Drew, 7; Judge Story's opinion, 9; case of John Birdsall, in Ohio, 10; remarks

of Dr. Drake 10 to 16; remarks in Boston Medical and Surgical Journal, 16 to 20.
Insolvent law of Illinois, 148.
Insurance, agencies for, regulated in Pennsylvania, 144; against fire, right of assured to make repairs, 330.
Interest, regulated in Illinois, 149; of England, 224; of France, 236.
Interest. See *Witness.*
Internal improvements in Pennsylvania, 144; in Illinois, 150.
Judges in the United States, list of, 167.
Judgments in Illinois, 148.
Jurisdiction. See *Admiralty Jurisdiction.*
Jury, instruction to, as it regards facts, 328.
Justices of the peace, laws respecting in Maine, 390; in Alabama, 400.

L.

Land Patents, Pennsylvania law, 143.
Lands of non-residents in New Hampshire, 396.
Law drafting done in a slovenly manner in Massachusetts, 182.
Law reforms in England, 408.
Legislation, recent in Pennsylvania, 142; Illinois, 145; Maryland, 151; Maine, 390; New Hampshire, 393; Virginia, 397; Alabama, 399;
Lien of mechanics in Illinois, 149.
Lien. See *Ships and Shipping.*
Limitation of real actions in Tennessee, observations on the statutes and decisions on the subject, 255 to 281.
List of Law publications, 183, 416.
Literary fund and free schools in Virginia, 397.
Lotteries licensed in Maryland, 153.

M.

Maine, recent legislation in, 390; law respecting disputed territory, 390.
Mandamus, when issuable in Maryland, 152.
Manufacturing Corporations in Maryland, 154.
Maritime Loans at Athens, 248.
Maryland, legislation of session of December 29, 1828, 161.
Master. See *Ships and Shipping.*
Medical Jurisprudence, observations on, 5.
Militia law of Maine, 390.
Minors entering into joint contract, the other joint contractor must be sued alone, 163.
Misnomer not to cause abatement in Maryland, 154.
Morris Judge, of Indiana, opinion on question as to rights of slave holders in the non-slave-holding states, 404 to 407.
Mortgage, law of, in New Hampshire, 395.

N.

Navigable channel, indictment for obstruction of, 185, 190. n.
New Hampshire, recent legislation of, 393.
New Hampshire Cases, review of, 109 to 115; abstracts generally well made, 109; a defective one commented on, 109, 110; opinion of C. J. Richardson on a question whether a right of way had been granted to the public, 111 to 114; opinions clear and logic close, 114; digest of cases in, 122.
Notaries public in New Hampshire, 394.
Nuisance by obstructing a navigable channel, 185 to 190.

P.

Partnership creditors, postponed to separate creditors, as it respects separate property, in Maryland, 320.
Pauperism in Virginia, 397.
Parsons, Theophilus, C. J. of Massachusetts, a dictum of his, that the colonial laws were annulled when the colonial charter was annulled, controverted, 118 to 121.
Pennsylvania, laws passed in 1828, 1829, 142.
Peters, Richard, Jr. review of his second volume of reports, 101 to 109; liable to same objections as preceding, 109; statements of case unnecessarily repeated, 109, 110; abstracts very faulty, 102; mere extracts from opinions of the judges, 103; examples of abstracts badly made, and their defects pointed out, 104 to 109; digest of cases in, 122.
Power of attorney, opinion of David Hoffman, Esq. on the construction of, 52 to 65.
Probate courts, historical sketch of, in Massachusetts, 237.
Probate Directory for New Hampshire, Vermont, and Massachusetts, reviewed, 237.
Probate judges in New Hampshire, 394.
Provincial and colonial laws, still in force as laws, notwithstanding change of government, 115 to 121; dictum of C. J. Parsons to the contrary controverted, 118 to 121.
Real actions, limitation of, observations on the statutes and decisions in Tennessee, 255 to 281.
Redesdale Lord, biographical sketch of, 412.
Richardson, C. J. of N. Hampshire, his opinions commended, 114.
Salaries in New Hampshire, 394; in Alabama, 402.
Seaman. See *Ships and Shipping*.
Seaman in the navy under arrest, may be retained for trial after his term of service expires, 281.
Ships and Shipping. Ship owners have lien on goods for freight, which may be enforced in admiralty by a libel in rem, 31, 32; no lien in case of charter party, where the charterer has possession of the ship, 32 to 37; master has a lien on the freight for disbursements and wages, 36; and on cargo of charterers, 39, 40; seamen have a lien on the freight for their wages, 43

to 50; and have a lien on cargo of charterers for a charge in the nature of freight, 50 to 52.
Slave holders, rights over their slaves in states where slavery is not permitted, 404.
Slavery in District of Columbia, Pennsylvania resolution respecting, 144.
Story, Judge, his opinion in a case of insanity produced by intemperance, 9.
Sunday, observance of, enforced in Illinois, 150.
Sureties, statute for their protection in Illinois, 150.
Surname, lawsuit respecting, 177.

T.

Tariff, resolutions against, of Virginia 399; of Alabama, 402.
Tax on lawsuits proposed by Governor Shultze, 181; taxes in Virginia, 397; in Alabama, 401.
Temperance, laws to promote in Maine, 392.
Tennessee, statutes of limitations as to real actions and decisions on them, examined, 255 to 287.
Tenterden, Lord, biographical sketch of, 163.
Thacher, Peter O. Judge, his charge in a case respecting the obstruction of a navigable channel, 188.
Trustee process in New Hampshire, 395.

V.

Virginia, recent legislation of, 397.
Votes, printed, are *written*, 408.

W.

Ware Ashur, Judge, two decisions by, 26 and 40.
Washington Bushrod, biographical notice of, 156.
Way, right of, case in New Hampshire, 111 to 114.
Wilde Samuel S. Judge, his opinion in a case of habeas corpus, 285.
Wills, Illinios statute of, 151.
Witness, persons interested in a suit ought to be permitted to testify, 20 to 26; universalists, disbelieving in any future punishments, not competent witnesses, in Connecticut, 338.

ERRATA.—Page 243, seventh line from top, for '*constitutional*' read '*constituted*;' same page, thirty-second line from top, for '*provisional*,' read '*provincial*.'

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